127-787

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 132.~~ 13

HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL AND HENRY SCHNEPPEL, PLAINTIFFS IN ERROR,

vs.

JAMES K. PARDEE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED SEPTEMBER 10, 1883.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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1 *Statement on Appeal.*

In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,

vs.

HUGH T. MURRAY, JAMES E. DURFEE, HENRY SCHNEPEL, and JOSIAH M. MERRILL, Defendants.

Said action was tried at the April term of said court, 1880, on the complaint of plaintiff, separate answer of defendants Murray and Durfee, and of defendant- Merrill and Schneple, and the replication of plaintiff thereto, and the supplemental complaint of plaintiff, and which was demurred to by said defendants, and demurrer overruled, and the answer of defendants Murray and Durfee thereto, and which said pleadings are in words and figures as follows, to wit:

2 In the District Court of the 2nd Judicial District, in & for the County of Deer Lodge, Montana Territory.

JAMES K. PARDEE, Plaintiffs,

vs.

HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, and HENRY SCHNEPLE, Defendants.

Now comes the above-named plaintiff and complains to this honorable court of the above-named defendants, and, for cause of action, shows: That on or about the 9th day of August, A. D. 1879, he was in the quiet and peaceable possession of the following-described mining ground, to wit: that piece or parcel of ground containing three and twenty-five one-hundre-th (3.25) acres, being known in the United States land office at Helena, Montana Territory, as mineral entry number one hundred and four (104) and numbered by the surveyor general of said Territory as lot No. thirty-eight (38), situate in township seven (7) north, of range thirteen (13) west, of the — principal meridian, in the Flint Creek mining
3 district, in the county of Deer Lodge, Montana Territory, and bounded as follows, to wit: Commencing at a limestone marked No. 1, thence north 35 degrees west 600 feet to a limestone marked No. 2; thence north 55 degrees east 118 feet to a limestone marked No. 3; thence south 35 degrees east 600 feet to a limestone marked No. 4; thence south 35 degrees east 600 feet to a granite marked No. 5; thence south 55 degrees west 118 feet to a granite marked No. 6; thence north 35 degrees west 600 feet to the place of beginning, said mining ground being *being* generally known as the Salmon and Cliff Extension mining ground, situate near the town of Phillipsburg, in the said county of Deer Lodge, Territory of Montana.

That on the aforesaid day, while plaintiff was so in the quiet and peaceable possession of said mining ground, the above-named defendants entered upon the same without plaintiff's consent and dug out certain ore therein contained and carried the same away and converted the same to their own use, and still continue to enter upon

said mining ground from that day to this and to extract
4 valuable ore therefrom and carry the same away and convert
the same to their own use, to the damage of plaintiff in the sum of twenty thousand dollars; that defendants have dug out of said mine and carried away therefrom and converted the same to their own use about one hundred tons of ore since the date aforesaid, of the value of one hundred dollars per ton, and are continuing to extract said ore from said mine at the rate of fifteen tons per day, which is of the aforesaid value of one hundred dollars per ton. Wherefore plaintiff asks judgment against the said defendants for the sum of thirty thousand dollars and their costs of suit herein expended.

And plaintiff, for a further and separate cause of action, with a view of attaining equitable relief, shows that on the said 9th day of August, A. D. 1879, he was in the quiet and peaceable possession and entitled to the possession of the following-described mining ground, containing 3.25 acres, being known in the United States land office at Helena, Montana Territory, as mineral entry No. 104, and numbered by the surveyor general of Montana Territory
5 as lot No. 38, embracing a portion of township No. 7 north, of range 13 west, of the — principal meridian, in the Flint Creek mining district, Deer Lodge county, Montana Territory. Said mining ground is generally known as the Salmon & Cliff Extension mine, near the town of Phillipsburg, in said county and Territory, and is bounded as follows, to wit: Commencing at a limestone marked No. 1, thence north 35 degrees east 600 feet to a limestone marked No. 2; thence north 55 degrees east to a limestone marked No. 3, 118 feet; thence south 35 degrees east 600 feet to a limestone marked No. 4; thence south 35 degrees east 600 feet to a granite marked No. 5; thence south 55 degrees west 118 feet to a granite marked No. 6; thence north 35 degrees west 600 feet to the place of beginning. These boundaries are set forth according to the official survey of the said ground by the surveyor general of Montana Territory; that on the said 9th day of August, A. D. 1879, the said defendants entered upon said mining ground and extracted and carried away from the same large bodies of valuable ore, and
6 continue from that time to this so to do, and threaten to continue so to do in the future, to the damage of plaintiff in a large amount, to wit, in the sum of thirty thousand dollars, and by the means aforesaid are taking and carrying away the substance of the estate of plaintiff, to wit, the rock, quartz, and mineral deposits therein, to his great and irreparable injury; that, unless restrained by the order of this court, these said defendants will continue to carry away said ore and quartz, to his damage in a very large sum of money; that the said defendants are not worth sufficient property to respond to him *in* for the wrongs and trespasses aforesaid and which will accrue if defendants continue to mine as aforesaid. Wherefore plaintiff prays that pending this action an injunction may issue restraining the said defendants from working said mining ground and extracting the ore and valuable mineral deposits therein contained, and that he may have an injunction enjoining

them forever entering upon or mining or extracting ore or other deposits from said mining ground, and that he may have judgment for his costs herein expended and for such other and further
7 relief as may be just and equitable in the premises.

HIRAM KNOWLES,
Att'y for Plaintiff.

TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

James K. Pardee, being first duly sworn, on oath doth depose and say that he has heard the foregoing complaint read and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true.

JAMES K. PARDEE.

Subscribed and sworn to before me this the 23d day of August, A. D. 1879.

J. A. QUINN,
Justice of the Peace.

8 In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, and HENRY SCHNEPEL, Defendants.

Now come said defendants, said Murray & Durfee, and for their separate answer to plaintiff's complaint on file in said cause and in answer to the first cause of action therein stated deny, upon information and belief, that said plaintiff ever was in the possession of the property described in his complaint, or any part thereof: deny that they, either by themselves or in conjunction with said defendants Merrill and Schnepel, at any time entered upon any part of said lode described in plaintiff's complaint, or dug out any ore therefrom, or carried any ore away therefrom, or converted any ore from said mine to their own use, or that they have damaged plaintiff
9 in any sum by reason of the taking of any ore; deny that since the 9th day of August, 1879, they, these defendants, have dug out of said mine described in plaintiff's complaint 100 tons of ore, or any other amount, or that any ore from any mine dug out by defendants is worth $100.00 per ton, or that they have taken 15 tons per day, or any other amount, of ore from said mine.

2nd. For answer to plaintiff's second and equitable cause of action, these defendants deny on information and belief that on the 9th day of August, 1879, or at any other time, plaintiff was in the possession of said mine described in his complaint, or any part thereof, or that he was ever entitled to the possession of the same; deny that on the 9th day of August, 1879, or at any other time, these defendants or either of them entered upon said mining ground described

in plaintiff's complaint, or any part thereof, or extracted or carried away from the same any ore whatever, or that they threaten so to do in the future; or that by reason of any acts of these defendants plaintiff has been or will be damaged in any sum whatever;
10 or that they are taking or carrying away the substance of said mine or estate, or any rock, quartz, or mineral deposits; or that they have done or threaten to do plaintiff or said Salmon mine any damage whatever, and deny that unless restrained by the order of this honorable court they will carry away from said mine in plaintiff's complaint described any ore or quartz whatever, or that plaintiff will be damaged in any sum whatever. Defendants aver that they are worth and own sufficient property to respond to plaintiff in any damages that may accrue to him by reason of any act of these defendants to said mine.

Defendants, for further answer to both of said causes of action, allege that they now own, and have ever since the month of February, 1875, owned, and have ever since said date been and now are in the actual, peaceable possession of, those certain lode- or veins, bearing silver and other metals, situated and being in said Flint Creek mining district, Deer Lodge county, Montana Territory, and known, and in said month of February, 1875, recorded in the
11 books of record of quartz lodes of said Deer Lodge county, as the Sharktown lode and the Scratchawl lode, and that said Sharktown lode lies on the easterly side of and adjoining said Salmon and Cliff Extension lode, and that said Scratchawl lode lies and extends across said lodes above named at nearly right angles and runs in an easterly and westerly direction; that these defendants have never worked or mined within the limits or boundaries of said Salmon and Cliff Extension lodes, or on the said mines or any part thereof, but that they have ever since said month of February, 1875, continuously worked on said Sharktown and Scratch Awl lodes, and have ever been in the actual, quiet, and peaceable possession thereof since said date; and that ever since said 9th day of August, 1879, these defendants have been working on the same mine, and in the same part thereof, where they have been working since said year of 1875, and have so worked these same mines said time uninterrupt*ab*ly by the claimants of said Salmon and Cliff Extension mines; that
12 during the entire time that these defendants have been so working said mines since said year of 1875 the claimants of said Salmon and Cliff Extension mines have had knowledge thereof at all times; and that they, said claimants of said Salmon and Cliff Extension mines, to wit, one Holland and one Estell, well knew that they, these defendants, were so working said mines and knew that they, defendants, were working where they have been working since the 9th day of August, 1879, and made no objection to such working or claim to said property till about the month of July, 1878, and that prior to said date these defendants had expended on said mines, and part thereof now occupied and being worked by these defendants about the sum of $28,000.00; and that since said date, said month of July, 1878, these defendants have expended on said mines and part thereof now being worked by them about the sum of

$17,000.00 opening and developing the same; and that the said claimants of said Salmon and Cliff Extension mines and said plaintiff have at all times had knowledge of said facts of such working
13 and developing, and made no objection thereto, and made no claim to the said premises so possessed and worked by these defendants until about the time this action was commenced; that, as will fully appear by the answer of said defendants, said Schnepel and Merrill, on the 6th day of August, 1879, said defendant Merrill was appointed, by order of the above-entitled court, a receiver in an action brought by said Schnepel against these defendants in said court for the foreclosure of a mortgage, for the purpose of working said mine so worked and possessed by these defendants, and to keep and retain the proceeds thereof, subject to the order of said court, and to account to said court therefor; and that under and by virtue of and authority of said order said defendant, said Merrill, on the 8th day of August, 1879, took possession of said mine as such receiver, and has ever since said date so held the same and is now so working the same as such receiver, all of which facts said plaintiff well knew at the time this said action was commenced by
14 him, plaintiff. Wherefore defendants, having fully answered, pray judgment for their costs expended.

J. C. ROBINSON &
CHUMASERO & CHADWICK,
Attorneys for Defendants.

TERRITORY OF MONTANA, } ss:
Deer Lodge County, }

Hugh T. Murray and James E. Durfee, being duly sworn, say on oath, each for himself, that he is one of the defendants named in the foregoing answer and has heard read the same and knows the contents thereof, and that the same and the facts therein stated are true of his own knowledge.

JAMES E. DURFEE.
H. T. MURRAY.

Subscribed and sworn to before me this 28th day of August, 1879.

J. C. ROBINSON,
Notary Public.

15 In the District Court of the Territory of Montana of the Second Judicial District in and for the County of Deer Lodge, said Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, and HENRY SCHNEPEL, Defendants.

Now come the above-named defendants, Josiah M. Merrill and Henry Schnepel, and, for their separate answer to the complaint of the above-named plaintiff on file in the above-entitled cause, deny that either by themselves or in conjunction with the above-named

defendants, Hugh T. Murray and James E. Durfee, at any time entered upon any part of the lode described in the aforesaid complaint, or dug out any ore therefrom, or carried any ore away therefrom, or converted any ore from said mine to their own use, or that they have damaged the said plaintiff in the sum of twenty thou-
16 sand dollars, as alleged in said complaint, or in any sum whatever, by reason of the taking away of any ore or in any way whatever. The said defendants deny that since the ninth day of August, in the year *A. D.* eighteen hundred and seventy-nine, they, these said defendants, have dug out of the mine aforesaid one hundred tons of ore, or any other amount of ore, or that they have carried away or converted to their own use any amount of ore since the day last aforesaid.

Second. For an answer to the said plaintiff's second and so-called equitable cause of action these aforesaid defendants, Merrill and Schnepel, deny, upon information and belief, that upon the aforesaid ninth day of August, or at any other time, said plaintiff was in the possession of said mine described in said complaint, or of any part thereof, or that he was entitled to the possession of the same. These said defendants further deny that on said ninth day of August, A. D. 1879, or at any other time, they or either of them entered upon said mining ground described in said complaint
17 or any part thereof, or extracted or carried away or converted to their own use any ore whatever from said mine, or that they threatened so to do in the future, or that, by reason of any act- of these said defendants, the plaintiff has been or will be damaged in any sum whatever, or that they are taking or carrying away the substance of said mine or estate, or any rock, quartz, or mineral deposits, or that they have done or threatened to do the plaintiff any damage whatever; and they deny that, unless restrained by an order of this court, they will carry away ore or quartz from said mine, or that the plaintiff will be damaged by them in any sum. These defendants, for a further answer to both of said alleged causes of action, allege, upon information and belief, that the said defendants Murray and Durfee now own and since the month of February, in the year *A. D.* eighteen hundred and seventy-five, have owned and have been and now are in the actual and peaceable possession of those certain lodes or veins, bearing silver and other metals,
18 situate, lying, and being in the Flint Creek mining district, Deer Lodge County, Montana Terrieory, and known, and in the said month of February, A. D. 1875, recorded in the books of records of quartz lodes of said Deer Lodge county, as the Sharktown lode and the Scratch Awl lode; and that said Sharktown lode lies on the easterly side of and adjoining the Salmon and Cliff Extension lodes described in the complaint aforesaid; and that said Scratch Awl lode lies and extends across said lodes last aforesaid, and at nearly right angles with said loles, and runs in an easterly and westerly direction.

These defendants further allege, upon information and belief, that the defendants Murray and Durfee have never worked or mined within the limits and boundaries of said Salmon and Cliff Extension

lodes, or on the said mines, or any part or parts thereof; nor have these defendants Merrill and Schnepel at any time so worked. These defendants further allege, upon information and belief, as follows: That the defendants aforesaid, Murray and Durfee, have ever since said month of February, A. D. 1875, con-
19 tinuously worked on said Sharktown and Scratch Awl lodes, and have ever been in the actual and peaceable possession thereof since said date, and that ever since said ninth day of August, A. D. 1879, said defendants, Murray & Durfee, have been working in the same mines and in the same parts thereof where they have been working since said month of February, A. D. 1875, and have so worked since said date uninterrupted by the claimants of said Salmon and Cliff Extension mines; that during the whole time that said Murray and Durfee have been so working said mines, since said month of February, A. D. 1875, the claimants of said Salmon and Cliff Extension mines have had knowledge thereof at all times, and that said claimants, to wit, one Holland and one Estell, well knew that said Murray and Durfee were so working said mines, and knew that said Murray and Durfee were working where they have been working since said ninth day of August, A. D. 1879, and said claimants made no objection to said working or claim to said property until about the month of July, in the year A. D. 1878, and
20 that prior to said date the said Murray and Durfee had expended on the said Sharktown and Scratch Awl lodes and the parts now occupied and being worked by said defendants about the sum of twenty-eight thousand dollars, and since said month of July said defendants have expended upon said mines and the parts now occupied by them and worked the sum of about seventeen thousand dollars in opening and developing the same, and that the aforesaid claimants of said Salmon and Cliff Extension lodes and the plaintiff herein have at all times had knowledge of the fact of said working and development, and that they or either of them made no objection thereto and made no claim to the said Sharktown and Scratch Awl mines so possessed and worked by said Murray and Durfee until about the time that this action herein commenced. The defendants further allege that on the sixth day of August, A. D. 1879, an action was pending in this court, and ever since has been and is now so pending,
21 wherein the said defendant, Henry Schnepel, is plaintiff, and the defendants herein, Hugh T. Murray and James E. Durfee, are defendants, and said action is for the purpose of foreclosing a mortgage executed by said Murray and Durfee to said Schnepel upon the aforesaid Sharktown and Scratch Awl mines; that on said sixth day of August the judge of this court made an order appointing the defendant, Josiah M. Merrill, a receiver of the said property, and in pursuance of such order and under and by direction thereof said Merrill took possession of said property, and so took possession of all ore in the dump of said mine, and has so held the said mine and ores and property under and by virtue of said appointment as receiver, and still still so holds the same; and that the ores and minerals which the plaintiff herein alleges that the defendants herein have dug out, carried away, and converted to their own use are the

ores and minerals which the said receiver, Morrell, took possession of by virtue of his appointment aforesaid, and which came
22 from said Scratch Awl and Sharktown mines, and not from said Salmon and Cliff Extension mines; that at the time of the commencement of this action the plaintiff knew of the appointment of said receiver aforesaid and of his said acts as receiver.

Wherefore defendants pray that this action be dismissed with costs.

J. C. ROBINSON &
CHUMASERO & CHADWICK,
Att'ys for Defendants.

TERRITORY OF MONTANA, }
County of Deer Lodge, } *ss:*

Josiah M. Merrill and Henry Schnepel, being duly sworn, say upon their oaths that they are the defendants named in the foregoing answer; that they have heard read said answer and know the contents thereof, and that the facts therein stated are true of their own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters they believe them to be true.

23 JOSIAH M. MERRILL.
HENRY SCHNEPEL.

Sworn to and suscribed before me this 28th day of August, A. D. 1879.

WILLIAM H. DEWITT,
Notary Public.

Replication.

In the District Court, Second Judicial District, in and for Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY *et al.*, Defendants.

Now comes the above-named plaintiff, and for a reply to the answer of the above-named defendants, Murray and Durfee, admits that the said defendants made some kind of a location of certain mining claims they called the Scratch Awl and Sharktown mining claims, but denies that it has ever been demonstrated that
24 there are any lodes or ledges in such location; denies that the said Scratch Awl lode, if there be any such, crosses that of the Salmon mine; denies that since the month of February, 1875, the said defendants have continually worked on the said Sharktown and Scratch Awl lodes, but avers that for the most of that time they have been working on the Salmon mine, claiming that it is either on one or the other of these ledges.

Plaintiff admits, upon information and belief, that Holland and Estell knew that the defendants, Murray and Durfee, were working

where they now are on the Salmon mine or in that vicinity since the year 1875, but, upon information and belief, denies that said work was done without objection on the part of said Holland and Estell, but avers the facts to be that the said Holland and Estell objected to defendants commencing work in sinking their shaft and have frequently claimed that these parties were working on their mine and should desist therefrom, although they had no cer-
25 tain knowledge that they were working on said Salmon mine, and in the month of July, 1878, gave said defendants a written notice that they would hold them responsible for all ore taken from said mine, believing that the same was the Salmon mine.

Plaintiff denies that before the said July, 1878, defendants had expended on said mine the sum of twenty-eight thousand dollars, or any greater sum than about eight thousand dollars, and denies that since that time said defendants have expended on said mine the sum of seventeen thousand dollars, or any greater sum than about four thousand dollars.

Plaintiff avers that during the time said defendants have been working on said mine they have extracted therefrom large quantities of valuable silver-bearing ore, which they have converted to their own use and sold, and that said ore was of so much value as that of the work done on said mine; that they have taken from said mine some seven hundred tons of ore valued at about $90.00 per ton.
26 Denies, upon information and belief, that Holland and Estell made no objection to defendants working where they have been since 1875.

Denies, upon information and belief, that they made no claim that where said defendants were working was the Salmon mine, but, upon the contrary, have for a long time claimed that the place where the said defendants were working was on the Salmon mine, although they had no positive knowledge of that fact; and the said defendants well knew that the said Holland and Estell so claimed from frequent conversations with them upon the subject.

Plaintiff avers that it was not certainly known that the works of Murray and Durfee were in the Salmon mine until he connected said works by a drift from the bottom of the incline on the Salmon, on the 13th day of August, A. D. 1879, and that on the 25th day of said month he commenced this action.

Plaintiff admits that said defendants have never worked within the external and surface boundaries of the Salmon mine, but
27 avers that beneath the said surface the said defendants have been working upon the said Salmon mine for a long time, to wit, at intervals since 1875.

Plaintiff admits that Josiah M. Merrill, one of the defendants herein, was appointed a receiver in the case of Henry Schnepel *vs.* said defendants, Murray & Durfee, to take charge of and work the Scratch Awl and Sharktown mines, but plaintiff denies that he was ever appointed by the judge of this honorable court to take possession of and work any portion of the Salmon mine.

Plaintiff avers that under said appointment the said Merrill had taken possession of a portion of the Salmon mine and is working,

and threatens to so continue to work, a portion of the Salmon mine.

Wherefore plaintiff asks that the prayer of his complaint may be granted.

HIRAM KNOWLES & THOS. L. NAPTON,
Attorneys for Plaintiff.

TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

James K. Pardee, the above-named plaintiff, being first
28 duly sworn, on oath doth depose and say that he has heard the above replication read, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true.

JAMES K. PARDEE.

Subscribed and sworn to before me this the 2nd day of September, A. D. 1879.

GEORGE W. IRVINE, *Clerk,*
By A. S. HIGGINS,
Deputy Clerk.

Replication.

In the District Court, Second Judicial District, in & for Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY *et al.*, Defendants.

Now comes the above-named plaintiff, James K. Pardee, and for a replication to the answer of defendants, Schnepel and Merrill,
29 *and* denies that the said defendants and Murray and Durfee or Merrill and Schnepel have been working upon any mining claims known as the Scratch Awl or Sharktown mining claims.

Denies that the said Murray and Durfee have been working on any such mining claims since the year 1875, or at any time during that year, and up to the present time.

That he acknowledges that defendants, Murray and Durfee, made some kind of a location of such mining claims, but plaintiff avers that it has never been demonstrated that there are any ledges or lodes within the limits of such locations.

Plaintiff admits that defendants, Murray and Durfee, have been working where they have been, or in that vicinity, since the year 1875, but, upon information and belief, plaintiff denies that the former owners of the Salmon mine submitted to such working without objection, but, on the contrary, often objected to said defendants working where they were, believing them to be working on a portion of the Salmon mine, although they had no positive knowledge of that fact.

30 Plaintiff, upon information and belief, avers that the said defendants, Murray and Durfee, always denied that they were

working upon the Salmon mine, and always claimed to be working on a separate mine.

Plaintiff avers that he made the discovery that the works of Murray & Durfee were on the Salmon mine about the 13th day of August, A. D. 1879, by running a drift from the incline on the Salmon mine to the shaft of Murray and Durfee sunk therein; that on the 25th day of said month he commenced this action.

Plaintiff avers that neither Holland -or Estell, the former owners of this mine, knew with any certainty that the said Murray and Durfee were working on their mine, and that the first positive knowledge of this fact was obtained when plaintiff connected the works on said mine on the said 13th day of August last.

Plaintiff denies that the defendants or any of them have expended in working on said mine the sum of twenty-eight thousand dollars prior to the month of July, 1878, or any greater sum than
31 eight thousand dollars, or that they have expended since that date seventeen thousand dollars or any greater sum than four thousand dollars.

And plaintiff avers that during the time defendants have worked said mine they have extracted large bodies of ore from said mine fully equal in value to the work they have performed upon said mine.

Plaintiff admits that the defendant, Josiah M. Merrill, was appointed by this court as a receiver in the case of Schnepel *vs.* Murray and Durfee, now pending in this court, but denies that the said receiver was appointed to take possession of and manage any portion of the Salmon mine, but avers the facts to be that he was appointed a receiver of the Scratch Awl and Sharktown mines, and avers the facts to be that in pursuance of such appointment he has taken possession of a portion of the Salmon mine and is working the same, to the great damage of this plaintiff.

Wherefore plaintiff asks that the prayer of his complaint be granted.

HIRAM KNOWLES,
Pl'ff's Attorney.

32 TERRITORY OF MONTANA, } *ss:*
County of Deer Lodge, }

James K. Pardee, the above-named plaintiff, being first duly sworn, on oath doth depose and say that he has heard read the foregoing replication and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein set forth on information and belief, and that as to these matters he believes it to be true.

JAMES K. PARDEE.

Subscribed and sworn to before me this the 2nd day of Sept., A. D. 1879.

GEO. W. IRVINE, *Clerk,*
By A. S. HIGGINS, *Deputy.*

Supplemental Complaint.

In the District Court of the Second Judicial District in & for Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,

vs.

HUGH T. MURRAY *et al.*, Defendants.

33 Now comes the above-named plaintiff, and, having first obtained permission of the above-named court, makes this his supplemental complaint against the above-named defendants, and for cause thereof states that on the 25th day of August, A. D. 1879, he filed herein his complaint against said defendants, wherein he stated that he was in the possession of the mining ground hereinafter described; that on the 1st day of September, A. D. 1879, defendants filed their answer herein; that on the 1st and 2nd days of September, 1879, plaintiff filed his replications to the separate answers of defendants; that on the 15th day of September, A. D. 1879, upon application of plaintiff, the judge of the above-named court made an order restraining defendants from working and extracting the ore from the mining ground hereinafter mentioned pending this action; that since all of said proceedings the plaintiff has become the owner of, and seized in fee of the mining ground described in plaintiff's original complaint, to wit: that certain piece or parcel of mining ground, containing three
34 and twenty-five one-hundreth- (3.25) acres, being known in the United States land office at Helena, Montana Territory, as mineral entry number one hundred and four (104), and numbered by the surveyor general of said Territory as lot No. thirty-eight (38), situate in township seven (7) north, of range thirteen (13) west, of the — principal meridian, of the Flint creek mining district, in the county of Deer Lodge, Montana Territory, and bounded as follows, namely: Commencing at a limestone marked No. one (1); thence north 35 degrees west 600 feet to a limestone marked No. two (2); thence north 55 degrees east 118 feet to a limestome marked No. 3; thence south 35 degrees east 600 feet to a limestone marked No. 4; thence south 35 degrees east 600 feet to a granite marked No. 5; thence south 55 degrees west 118 feet to a granite marked No. 6; thence north 35 degrees west 600 feet to the place of beginning; said mining ground being generally known as the Salmon and Cliff Extension mining ground, situate near the town of Phil-
35 lipsburg, in the said county of Deer Lodge, Territory of Montana; that for a supplemental pleading and complaint to that portion of plaintiff's complaint seeking equitable relief plaintiff states, having first obtained permission of the court above named as heretofore, that on the 25th day of August, A. D. 1879, the plaintiff filed his original complaint herein against defendants for equitable relief; that on the 1st day of September, 1879, defendants filed their answers herein; that on the 1st and 2nd days of said September, 1879, the said plaintiff filed his replication herein to the defendants' answers; that on the 15th day of said September the judge of the

above-named court made and filed herein an injunction restraining defendants from extracting ore from the mining ground hereinafter mentioned pending this action; that at the time of commencing this action plaintiff, so he alleged in his complaint, was duly possessed of the said mining ground mentioned below and entitled to the possession of the same; that since the time of the afore-
36 said acts plaintiff has acquired the legal title to said mining ground, and plaintiff alleges that he is the owner of said ground and seized of the fee therein; that the said mining ground is described in the preceding portion of this complaint as follows, to wit: That certain piece or parcel of mining ground containing three and twenty-five one-hundreth- (3.25) acres, being known in the United States land office at Helena, Montana Territory, as mineral entry No. 104, and numbered by the surveyor general of Montana Territory as lot No. 38, embracing a portion of township No. 7 north, of range 13 west, of the — principal meridian, and known generally as the Salmon and Cliff Extension mining ground, situate in Flint creek mining district, Deer Lodge county, Montana Territory.

Wherefore plaintiff asks judgment as prayed for in his original complaint.

HIRAM KNOWLES & THOS. L. NAPTON,
Attorneys for Plaintiff.

TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

37 James K. Pardee, being first duly sworn, on oath doth depose and say: I have heard read the foregoing supplemental complaint and know the contents thereof, and the same is true of *his* own knowledge, except as to the matters therein stated on information and belief, and that as to those matters *he* believes it to be true.

JAMES K. PARDEE.

Subscribed and sworn to before me this the 2nd day of December, A. D. 1879.

GEORGE W. IRVINE, *Clerk.*

Answer to Supplemental Complaint.

In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff, *vs.* HUGH T. MURRAY *et al.*, Defendants.

Now come said defendants, said Murray and Durfee, and for their separate answer to plaintiff's supplemental complaint *and* den*ies* that plaintiff has acquired the legal title to said mining
38 ground in controversy, or is the owner of or seized in fee therein or was ever so seized or so owned.

Defendants aver for further answer to the said supplemental complaint that said premises and property in controversy is a quartz mining claim and lode; that these defendants, in the month of January, 1875, located the same and took possession thereof under

the laws of the United States relating to the location and occupancy of lode claims, and at said time in said month of January, 1875, took and entered upon the actual, exclusive, and open possession thereof, and have ever since so held and occupied and possessed the same, and which said possession was with the full knowledge of plaintiff and his grantors, and hostile and adverse to them, and that until the 11th day of June, 1877, no part of said premises claimed by plaintiff was pretended or claimed to have been patented; and that these defendants have, ever since such possession and occupancy by them, held the said mines under and by virtue of and in accordance with the statute of the United States and said Territory and
39 local laws and customs of said mining district; and that said action was not commenced within the time prescribed by the statute of said Territory, and that said action is barred by the provisions of sections two and four of an act to amend an act entitled "An act concerning limitations," approved February 9, 1865; approved January 11, 1872.

Wherefore defendants pray judgment for costs.

J. C. ROBINSON &
CHUMASERO & CHADWICK,
Att'ys for Defendants.

TERRITORY OF MONTANA, }
Deer Lodge County, } ss:

Hugh T. Murray, being duly sworn, on oath says that he is one of said defendants named, and has read the foregoing answer and knows the contents thereof, and that the facts therein stated are true of his own knowledge.

HUGH T. MURRAY.

Subscribed and sworn to before me this 8th day of April, 1880.
[SEAL.] JOSIAH M. MERRILL,
Notary Public.

40 A jury having been empaneled, said cause as to said question of damages alleged and denied in said pleadings was tried before said jury, and the question involved in the equitable part of said action as to said application for an injunction was submitted to said jury, and as to said matter special findings were required of the jury on questions submitted to them for answer, and which said questions and answers to the same will more fully appear hereafter in this statement. Said defendants on said appeal will rely for a reversal of the judgment in said cause on errors of law occurring at said trial submitted to the court and duly excepted to by defendants; in admitting testimony for plaintiff and refusing to admit testimony for the defendants, and in also giving to that jury instructions asked by plaintiff, and the refusal to give instructions asked by defendants, and all of which were duly excepted to at said trial, and as a specification of errors said defendants assign as follows:

41 *Specification of Errors.*

1. The court erred in permitting plaintiff's witness, Foote, to testify as to the hanging wall of a contact vein, when it is not shown that he was a mining expert, or had any knowledge of mining, but was only a civil engineer, and such question involves one of knowledge of mining, which is set out in defendants' first exception.

2. The court erred for same reason in allowing said witness to testify as to the width of the said Salmon vein, as embodied in defendants' second exception, when the width of the Salmon vein was a material and one of the principal things at issue, and said witness had no knowledge of mining—of the matter sought to be proved by him.

3. The court erred in permitting said witness, Foote, to testify as in defendants' third exception for the same reason, and that the said witness had no knowledge sufficient to testify as to said matters.

4. The court erred in not permitting said defendant to ask said witness, Foote, on cross-examination the question embodied
42 in their 4th exception, for the reason that said question involved testimony material to said issues, the "Speckled Trout" mines being shown to be in the vicinity.

5. The court erred in not permitting defendants to ask said witness Foote on cross-examination the question embodied in defendants' 5th exception, for the reason that it was a matter material to the issue in said cause to ascertain the course of the vein in said district and vicinity.

6. The court erred in not allowing defendants to ask said witness Foote the question embodied in their 6 exception, for the reason above stated in the 4th and 5th exception- of defendants.

7. The court erred in not permitting plaintiff's witness Estell to testify to facts stated in defendants' 7th exception on cross-examination, as said witness had testified to fact of sinking the incline named, and as there being evidence of a lead crossing said Salmon lode at said point was material, and any declaration made by said Estell while sinking said incline was proper evidence on cross-
43 examination, said Estell being at said time an owner in said Salmon mines.

8. The court erred in permitting said witness Estell, on a redirect examination, to testify as in defendants' 8th exception shown, said question being leading, and said witness having on direct examination testified to said matter involved in said question, and nothing new as to the same brought out by defendants on cross-examination.

9. The court erred in permitting plaintiff Pardee to testify to the matter involved in defendants' 9th exception, as said question was leading.

10. The court erred in permitting plaintiff Pardee to testify to the matter involved in defendants' 10th exception, for the reason therein shown.

11. The court erred in permitting said plaintiff to testify to and answer the question contained in defendants' 11th exception, for the reason in said exception assigned.

12. The court erred in refusing to allow defendants to ask
44 and said plaintiff to answer the question contained in defendants' 12th exception, as said question was directed to a matter affecting the question as to who was in possession of the place where the alleged trespass was committed.

13. The court erred in not permitting said defendants to ask and said *defendants* to answer the question contained in defendants' 13 exception, as plaintiff had testified as to the "Speckled Trout" mine, and it was competent to ask him said question as showing the dip of the other mines in the vicinity of the one in litigation.

14. The court erred in not permitting the defendants to ask the question of Pardee, plaintiff, contained in defendants' 14 exception, as it was proper to show that as the said place and all other places where paying ore was found on the so-called Salmon lode it was where another vein crossed it, and to disprove the existence of such a lode as the Salmon.

15. The court erred in not permitting defendants to ask plaintiff Pardee the question contained in defendants' 15 exception, as
45 such question involved an admission on plaintiff's part of the right of defendants to work wherever the alleged trespass was committed.

16. The court erred in refusing to defendants the right to prove the matter asked and contained in their 16 exception, for the reason stated above.

17. The court erred in not permitting defendants to ask said plaintiff the question contained in their 17 exception, for the reason that said question tended to prove that plaintiff recognized defendants' right to work there and disprove any trespass.

18. The court erred in permitting plaintiff's attorney [to] ask plaintiff the question contained in defendants' 18 exception, for the reason therein contained.

20. The court erred in admitting in evidence the record contained and set out in defendants' 20 exception, for the reason that all of said record- were irrelevant to the issues in said cause and tended to mislead and prejudice the jury, as said records all pertained to a foreclosure suit by defendant Schnepel against defendants
46 Murray and Durfee, and defendant Merrill was but a receiver in said cause, and said records and action had no tendency to prove any issue in this cause and receivership by said Merrill to be set up as a defense as an officer of the court.

21. The court erred in not permitting defendants to prove all the matters asked to be proven by their witness, Durfee, and as contained in *in* defendants' 21 exception, for the reason that it was competent and proper to *to* show as a justification of the alleged trespass that defendants were working said ground under claim of title thereto, and that they had located what they claimed as a separate lode or lodes, known as said Sharktown and Scratch Awl lodes, and defendants were prejudiced by not being permitted to prove said location.

22. The court erred in not permitting defendants to ask said witness Durfee the question contained in the 22 exception of defendants,

as said matter was proper as bearing on the question of the existence of said Salmon lode and its extent and the existence of
47 said Scratch Awl lode.

23. The court erred in not permitting the defendants to ask said witness the question contained in defendants' 23d exception, as said question was for the purpose of proving a cross-lode known as the Scratchall lode, and not as the Salmon, where defendants took the ere complained of, and said question was not leading, as claimed by plaintiff.

24. The court erred in not permitting said plaintiff to answer the question contained in defendants' 24 exception, for the reason said question was for the purpose of proving who was in possession of the premises when the alleged trespass was committed, and which *being* in issue.

25. The court erred in not permitting the question contained in defendants' 25 exception, for the reason as to the defendants' 24 exception.

26. The court erred in not permitting defendant to ask said witness Durfee to answer the question contained in defendants' 26 exception, for the reason said Pardee denied making any statements to said Durfee as to such conversation, in which said Pardee said that he would swear to a lie to win a mine, and which was com-
48 petent to prove under the statute of the Territory to impeach his testimony.

27. The court erred in refusing to permit defendants to prove that there was a lead crossing the Salmon east and west, as in defendants' 27 exception contained, as said matter was material to the issue in said cause.

28. The court erred in sustaining plaintiff's objection to defendants' question to witness Merrill, as contained in defendants' 28 exception, as it was material to know whether or not Murray and Durfee were working as employés of Merrill or for themselves as affecting the question of damages.

29. The court erred in refusing to allow defendants' witness Jones to answer the question contained in their 29 exception as to the fact of the ore running in the same direction as in what the defendants claimed to be the Scratch Awl lode and in a different direction to the Salmon *is* evidence tending to establish the fact of the existence of said Scratch Awl and non-existence of the Salmon vein.

49 80. The court erred in not permitting defendants to prove by their witnesses Coulter and Jones the matters offered to be proven by them, and as contained in defendants' 30 exception, for said matter as allowed and material to the question involved in said cause to create, if proven, a presumption that there is a vein, as defendant claimed, to be the Scratchawl, and there is no such vein as the Salmon.

32. The court erred in not permitting defendants' witness Cain to testify — to answer the question in defendants' 31 & 22 exceptions, for the reason therein stated.

33. The court erred in not permitting defendants' witness Ryan to answer the question contained in defendants' 33d exception, as it

was material to the issue to prove the existence of a cross-vein where defendants were working, and said testimony was to such effect.

34. The court erred in not permitting defendants' witness Hart to answer the question contained in defendants' 34th exception, for the same reason as stated as to defendants' 33d exception.

50 35. The court erred in not permitting defendants' witness Murray to answer the question contained in defendants' 35th exception, for the reason that said question went to the question of possession, which was in issue.

36. The court erred in not permitting defendants to prove by defendants' witness Murray the matters offered to be proven as contained in defendants' 36 exception, for the reason shown in said exception, and that for said purpose for which it was offered that it was competent under the issues to show that defendants were in possession of a place where the trespass was alleged to have been committed, and under a color of right, and had a right thereto, and that said right of plaintiff, if any he had, was barred by the statute of limitations.

37. The court erred in not allowing defendants to prove the amount of their expenditures in said mine, as contained in 37 exception, as the same showed good faith in defendants in working said mine, and was for such purpose relevant.

51 38. The court erred in not permitting said Murray, defendant, to testify and by him to prove what was sought to be proven as contained in defendants' 38 exception, for the reason that said matter was relevant, and would tend to show that the defendants were working their own ground, the said Scratch Awl lode, and not on said Salmon.

39. The court erred in refusing to permit defendant Murray to answer the question contained in defendants' 39 exception, as said question was directed to a matter material to the issues involved as to the width of said Salmon lode, and to its existance.

40. The court also erred in not permitting said Murray to answer the question contained in defendants' 40 exception, for the same reason as to said 39 exception.

41. The court erred in not permitting defendant Murray to answer the question contained in defendants' 41 exception, for the reason therein stated.

42. The court erred in not permitting defendants to introduce in evidence the records named in defendants' 42 exception,

52 as said records were and constituted a part of the evidence of the title relied on by defendants to the premises where the trespass was alleged to have been committed.

43. The court erred in not permitting said defendant Murray to answer the question contained in defendants' 43 exception, for the reason that it was competent to prove that defendants were working within the limits of ground they had located and claimed title to and owned, and not on the said Salmon lode.

44. The court erred in not permitting said defendant Murray to answer the question contained in defendants' 44 exception, for the reason that said Holland and Estell, being the owners in possession

of said Salmon mine, their declaration as to the extent of their mine and everything in connection with it as bearing on the rights of said parties and conflicting interests was admissible in evidence.

45. The court erred in not permitting defendant Murray to answer the question contained in defendants' 45th exception, for the reason as to defendants' 44 exception above.

53 46. The court erred in not permitting defendants' witness Clark to answer the question contained in defendants' 46 exception, as such question was relevant and proper, as it was to prove a material fact as affecting the issue that the plaintiff's testimony showed certain portions of what he claimed to be the Salmon mine to be metamorphic lime, and that said matter was vein matter, and as said question was directed to said point it should have been permitted.

47. Said court erred in not sustaining defendants' objection to the question to defendants' witness Clark, in cross-examination by plaintiff, as contained in defendants' 47 exception, for the reason therein stated.

48. The court erred in overruling defendants' objection to the question by plaintiff to defendants' witness Ringling as to said maps, as contained in defendants' 48 exception, and to permitting said maps in any way to be used or referred to, for the reason stated in said exception.

54 49. The court erred in sustaining plaintiff's objection to defendants' question to their witness Brown, as contained in defendants' 49 exception, as and for the reason that said plaintiff claimed and testified as to certain seams being the foot-wall of said Salmon lode, and it being material to ascertain where said foot-wall was, said question should have been permitted.

50. The court erred in allowing plaintiff's witness Estell to answer the question contained in defendants' 50 exception, for the reason therein stated.

51. The court erred in sustaining plaintiff's objection to the introduction of the paper mentioned in defendants' 51 exception, being the complaint in a forcible-entry case against defendant- by the plaintiff, as said complaint was an admission by plaintiff that defendants were in possession of said premises claimed to have been trespassed upon, and the *locus in quo*, the trespass, and at the time damages in this action were claimed, and said question of possession by defendant- was material to the issue herein.

55 52. The court erred in permitting plaintiff in rebuttal to answer the question contained in defendants' 52 exception, for the reason therein stated.

53. The court erred in not permitting defendants' witness Murray to answer the question contained in defendants' 53 exception, for the reason therein stated, and said question tended to draw forth evidence from said witness of a material fact to said issue in that as the extent of the Salmon mine was a material issue, and the declaration of Estell while he owned and possessed said mine, with the evidence to bind or affect the plaintiff in the case, and ought to have been permitted.

54 & 55. The court erred in sustaining plaintiff's objection to the testimony of defendant offered, and as contained in defendants' 54 & 55 exceptions, so marked, for the reason that said evidence was proper for all the reasons therein stated, and should have been admitted for such purpose.

56 56. The court erred in not permitting defendants to prove by their witness Murray, one of the defendants, the matter offered to be proved and contained in defendants' 56 exception for the reason therein stated, and that the location and marking the boundaries, &c., of the Scratch Awl lode, record, &c., would show defendants' right to mine said place, and all said matter went to the question of defendants' right to work said place where the trespass is alleged to have been committed.

And which said exceptions above referred to are in words and figures as follows, to wit:

In the District Court, 2d Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff, *vs.* HUGH T. MURRAY *et al.*, Defendants.

Be it remembered that at the trial of said cause, at the April term of said court, 1880, and which said trial began on the — day

57 of May, 1880, George B. Foote was called as a witness for said plaintiff, and was, on direct examination, asked the following question, to wit:

1st. What is the hanging wall of the contact? To which defendants objected for the reason that said witness was not an expert, but only a civil engineer, and the question involved a question of mining skill, and which said objection was overruled, and the ruling then and there duly excepted to.

When the witness proceeded to state that the said hanging wall is granite at present and the foot wall is limestone.

2d. Said witness was then asked:

"What is the width of the vein between the two walls?" Which was objected to for the same reason as the last question, and which said objection was overruled and duly excepted to by said defendant, when said witness answered as follows:

"That between the clearly defined granite and limestone there is a width extending as high as 120 feet; in some places it is narrow. The minimum is about 60 or 70 feet, as far as any survey

58 went. Outside of the survey it is as low as 7 or 8 feet; at the salmon incline the apex of the lode is nearly in the centre o the surface ground.

3rd. Said witness was then asked: First. What is the vein there filled with? Which was objected to by the defendants for the reason that said witness was not shown to be an expert, and the question was one requiring such knowledge to answer, and which objection was overruled and duly excepted to, when the witness answered:

"The vein is filled with manganese or limestone ore, silver ore, talc, and vein matter.

4. On the cross-examination of said witness, Foote, defendants asked him the following question: "Do you know which way does the Speckled Trout vein run?" To which plaintiff objected, and which said objection was sustained, and to which said ruling defendants excepted.

5. Said witness Foote was asked in cross-examination the following question: "What is the general direction of the veins in
59 that district?" To which the plaintiff objected, and said objection was sustained, and said ruling duly excepted to by defendants.

6. Said witness Foote was asked in cross-examination by said defendants as follows: "Does the surface ground of the Speckled Trout mine, marked on your map, run in the same direction as the Speckled Trout lead?" Which said question was objected to by the plaintiff, and said objection sustained, and said ruling excepted to by defendants.

James W. Estell was examined as a witness on the part of plaintiff and testified as to having sunk an incline at the place where the Scratch Awl lode is claimed by the defendants to cross the Salmon lode, and as to Schnepel being at said incline while he was sinking the same, and was asked on cross-examination as follows: "Did not Mr. Schnepel speak to you of ore in the incline?" To which plaintiff objected, and the objection was sustained, and to which the defendants excepted.

8. On redirect examination said witness Estell was asked by plaintiff as follows, to wit:

60 "If the wall runs north and south can there be a cross-lead?" Which question was objected to by defendants as being leading, and that said witness had been examined by plaintiff as to said matter, and which objection was overruled, and said ruling excepted to by defendants.

9. Jas. K. Pardee, the plaintiff, was examined as a witness in his own behalf and was asked this question by his attorneys:

"At any time did defendants, or any of them, enter the Salmon mine?" The witness then answered that they did, and that they mined, carried away, and milled ore from the Salmon mine. Merrill was receiver, and Murry and Durfee were laborers for hire. The receiver was there in Schnepel's interest; they carried away ore for 20 or 30 days while I was in possession. The defendants objected to the question which called forth the last answer as being leading, which objection was overruled, and the ruling was excepted to.

10. Said defendant testified as follows:

61 I had a conversation with defendant Schnepel soon after the 9th day of August, 1879, when we broke through. I had made an effort to compromise with Murray and Durfee and then consulted Schnepel, as I knew he held a mortgage on property. I took him down the incline. I took him into the 54-foot level of the incline. Plaintiff's counsel then asked said Pardee as follows: "State what, if anything, defendant Schnepel said to you with refer-

ence to the identity of the Salmon mine, in the conversation, and the place where and in which you have testified concerning ore was taken out, and where and under what circumstances this conversation was had." To which defendant objected, for the reason that such conversation involved a compromise between said parties, and was not admissible by defendant as such, and Schnepel's declaration would not bind the others; and which objection was overruled, admitting it as against Schnepel alone, and said ruling duly excepted to, when said witness testified as follows:

"The day before I went to Deer Lodge to commence this
62 suit, about the 22d day of August, A. D. 1879, I went to the Salmon mine with defendant Schnepel; we went down the incline and through the 54-foot level; I showed him the ore in the cross-cut; we went through — 72-foot cross-cut to the connection with the Murray and Durfee shaft; I showed him that the incline and cross-cut were in veins matter, and all in the Salmon mine; I showed him the Murray and Durfee shaft, and also the connection and ore all the way down the incline, when Schnepel said it was a hard thing for him to do to have to admit that he was wrong; that he had no idea he, plaintiff, had so plain a case; that so far as the black-vein matter goes I, plaintiff, could hold mine, and that he, Schnepel, was satisfied that at the end of the cross-cut the Murray and Durfee shaft was in the Salmon mine or vein, and he would have nothing further to do with Murray and Durfee. When we parted he said he thought we would have no trouble, giving me to understand that he would not further put up for Murray and Durfee.

63 11. Said defendant Pardee was asked by his attorneys the following, on direct examination:

"How does the filling of the Estell lode compare with the filling of the Salmon?" To which defendants objected, for the reason that said witness is not an expert, and said Estell being too far away from said Salmon lode to be any evidence, which objection was overruled, and said ruling was duly excepted to by defendants, when the witness answered as follows:

They are very much alike; the vein matter of the Estell is an exact counterpart of the Salmon; the ore at the Estell is purer than the Salmon; outside of the character of the ore the vein is almost a fac-simile of the Salmon.

12. Said plaintiff was asked in cross-examination by said defendants as follows:

"Did you go in the Murray and Durfee leads and tear it down?" Which said question was objected to by plaintiff, and the objection sustained, and said ruling was duly excepted to.

13. Plaintiff was asked on cross-examination as follows:

64 "How did the manganese in the Speckled Trout mine dip?" Which said question was objected to by plaintiff, and the objection sustained, and the ruling duly excepted to.

14. Plaintiff was asked on cross-examination as follows:

"Is there not another location at the point you are now speaking of; said point being where plaintiff testified he was taking out ore of high grade, some 200 or 300 feet south of the incline and on the

Estell mine?" Which question plaintiff objected to, and the objection was sustained, and the ruling excepted to.

15. On cross-examination plaintiff was asked this question by the defendants:

"In your negotiations with Murray & Durfee did you not recognize their title to the Scratch Awl lode?" Which said question the plaintiff objected to, and the objection was sustained by the court, and the said ruling of the court was excepted to by the defendants.

16. Said plaintiff was also asked on cross-examination as follows, to wit:

"Did you not claim in 1876 and 1877 that there was a vein
65 known as the Scratch Awl, and so located by Murray and Durfee?" Which question was objected to by the plaintiff, and the objection was sustained by the court, and the ruling of the court thereon was excepted to by the defendants.

17. Said plaintiff on cross-examination was also asked as follows by the defendants: "In 1876 did you not make a contract with Murray and Durfee for a vein known as the Scratch Awl mines? Which said question was objected to by the plaintiff, and the said objection was sustained by the court, and the ruling of the court thereon was excepted to.

18. On redirect examination said plaintiff was asked as follows: What do you say as to whether or not this granite boulder is a part of the curious condition of granite overhanging the lime? Which said question was objected to by the defendants for the reason that it is not a proper redirect examination; that nothing new was brought out on cross-examination as to this matter. The ob-
66 jection was overruled, and the ruling excepted to by defendants, when the witness testified:

That the boulder is the greater curiosity.

19. Harvey Shower, a witness for the plaintiff, was examined in chief and cross-examined by the defendants as to various matters, and on redirect examination was asked as follows:

Take the ore shute crossing the salmon mine and project it west through the foot wall; what would be the true direction; where would it come out? Which was objected to by defendants as not proper redirect examination, and that nothing new was brought out on cross-examination to warrant it, and which objection was overruled by the court, and said ruling excepted to, when the witness stated: "It would strike a short way above the northwest mill."

20. Plaintiff offered in evidence the judgment roll in case No. 1366 in this court, which is as follows, to wit:

67 In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

HENRY SCHNEPEL, Plaintiff,

vs.

HUGH T. MURRAY & JAMES E. DURFEE, Defendants.

Plaintiff complains of said defendants, and for cause of action alleges that on the 25th day of May, 1878, at the town of Phillips-

burg, in Deer Lodge county, Montana Territory, said defendants, for a valuable consideration, executed to plaintiff their promissory note whereby they promised to pay to plaintiff or his order, twelve months from said date, the sum of five thousand four hundred and sixty-three and $\frac{65}{100}$ dollars, with interest thereon at two per cent. per month from said date till paid, and which said note is in words and figures as follows, to wit:

$5,463.65. PHILLIPSBURG, MONTANA, *May* 25, 1878.

For value received, twelve months from date, we, or either of us, promise to pay Henry Schnepel or order five thousand four
68 hundred and sixty-three & $\frac{65}{100}$ dollars, with interest thereon at the rate of two per cent. per month from date till paid.

(Signed) HUGH T. MURRAY.
JAMES E. DURFEE.

That said defendants have failed to pay said sum or any part thereof, and that said note and sum therein named, both principal and interest, is wholly unpaid.

That to secure the payment of said note said defendants, on said 25th day of May, 1878, executed to plaintiff their certain indenture of mortgage, whereby they conveyed to plaintiff the property in said mortgage described, and which said property is and being as follows, to wit: All that certain quartz lode, lead, or vein bearing silver and other metals, and known, designated, and recorded in the books of records of quartz lodes of said Deer Lodge county, by said Durfee, on the 5th day of January, 1875, in book F, page 298, as the Sharktown lode, and being 1,500 feet (linear) on and along said lode and 325 feet wide, and for a more particular description
69 thereof reference is hereby made to said record above referred to; also that other certain quartz lode, lead, or vein bearing silver and other metals, and known, designated, and recorded in the books of records of quartz lodes above named, by said Durfee, on the 19th day of January, 1875, on page 331 thereof, as the Scratch Awl lode, and being 1,500 feet on and along said lode, and 312 feet wide; and for a more particular description of said lode reference is hereby made to said record above referred to; also that portion of that other certain quartz lode, lead, or vein bearing silver and other metals, and being known, designated, and recorded in the books of records of quartz lodes of said Deer Lodge county on the 22nd day of June, 1867, as the Navejo lode, and being claims number one northwest, and Discovery claim on said lode located by Dr. H. Crepin; and claim number one, east of Discovery claim, located by William Hardenburk; and claim number two, east of Discovery claim, on said lode, located by James H. Brown, and all of said claims on said last-named lode, being two hundred feet—linear feet—on and along said lode; also that certain
70 tunnel on said 25th day of May, 1878, being run by said defendants for the purpose of tapping and intersecting said above-described Sharktown lode and now completed; and also that certain blacksmith shop at the mouth of said tunnel; also that other

certain quartz lode, lead or vein, bearing silver and other metals, located and recorded in the book of records of quartz lodes of said Deer Lodge county, in book J, on page 198 thereof, on the 30th day of January, 1878, as the "Blackmail lode," and being 1,500 linear feet on and along said lode, and sixty feet wide, and located by said defendant, and for a more particular description of said lode reference is hereby made to said record above named, with all rights, privileges, and improvements on or in any way connected with or belonging to said above-described property; and all of which said property is situated and being in Flint Creek mining district, in Deer Lodge county, Montana Territory; and which said mortgage
is hereto attached and marked "Exhibit A" is hereby made
71 a part of this complaint; that said defendants, by the terms of said mortgage *and* therein and thereby agreed and undertook and promised, in case they failed to pay said note and sums therein named, and in case of action to foreclose said mortgage, or on the proceedings therein to enforce the same, to pay an additional sum as an attorney's fee for such foreclosure, such as might be reasonable and just therefor, as might be adjudged by the court; that the sum of two hundred and fifty dollars is a reasonable attorney's fee for the foreclosure and enforcement of said mortgage and plaintiff's rights thereunder, and that he, plaintiff, has agreed with his said attorney on said sum and become liable to him for the same; that said defendants are now working and mining said Sharktown and Scratch Awl lodes, and extracting therefrom and milling and working the ore therefrom, and appropriating the proceeds of such working to their own use, and are applying none of the same to the payment of said debt above set out, and that
the only value said lodes possess is the metals therein
72 contained, and which said metals are being so taken therefrom by said defendants in said working and mining as aforesaid by said defendants, and so appropriated by them as aforesaid; and that said defendants are thereby exhausting and impairing the security of plaintiff for said demand and rendering said property of less value; and that the only security plaintiff has for said demand is said property above described, and that said lode- other than said lode last named are of little value and undeveloped and of doubtful security for said demand; and that said defendants have no other property or means than that above described, and that said tunnel is of no value except in connection with and for the purpose of working said lode. Wherefore plaintiff prays judgment for said sum of five thousand four hundred and sixty-three & $\frac{65}{100}$ dollars and interest thereon at the rate of two per cent. per month from the 25th day of May, A. D. 1878, and the further sum of two hundred and fifty dollars for an attorney fee for the foreclosure
73 of the said mortgage, to be included and form a part of said judgment and cost of suit; and that a receiver may be appointed to take charge and possession of the proceeds of said mine so worked by said defendants, and to account to the court therefor, and make such disbursements and disposition of such proceeds as may be ordered by said court.

And that said mortgage be foreclosed, and that said mortgaged property be sold by the sheriff of said county, and the proceeds thereof applied to the payment of said judgment to be obtained and costs of sale, and that said defendants be forever barred and foreclosed of all rights and equities therein save and except the statutory right of redemption, and for such other and further relief as to the court may seem meet in the premises.

2. For other, further, and second cause of action, plaintiff alleges that on the 17th day of January, 1879, at the town of Deer Lodge, Montana Territory, said defendants, for a valuable consideration, executed to plaintiff their promissory note, whereby they
74 promise to pay to plaintiff or order the sum of fourteen hundred and thirty-seven & $\frac{3}{100}$ dollars on or before the 25th day of May, 1879, with interest at two per cent. [per] month from date till paid, and which said note is in words and figures as follows, to wit:

"DEER LODGE, MONTANA TERRITORY,
"*January* 17, 1879.

"On or before the 25th day of May, A. D. 1879, we, or either of us, promise to pay Henry Schnepel or order fourteen hundred and thirty-seven $\frac{3}{100}$ dollars for value received, with interest thereon from date until paid at the rate of two per cent. per month.

"(Signed) HUGH T. MURRAY.
"JAMES E. DURFEE."

That said defendants have failed to pay said sum, or any part thereof, and that the same, both principal and interest, is now wholly unpaid; that to secure the payment of said note said defendants, on said 17th day of January, A. D. 1879, executed to this plaintiff their certain mortgage whereby they conveyed a deed for such security, all the property in said mortgage described, and which is the
75 same property as that described in said mortgage set out in plaintiff's first cause of action herein and described in said first cause of action, and to which first cause of action reference is hereto made for a description of said property so conveyed and mortgaged as aforesaid, and which said mortgage to secure said note named in this second cause of action is hereto attached, marked Exhibit B, and is made a part of this complaint; that said defendants by the terms of said mortgage *and* therein and thereby agreed and understood and promised in case they failed to pay said note and the sum therein named, and in case of any action to foreclose said mortgage or other legal proceedings to enforce the rights of plaintiff in the premises, to pay plaintiff such additional sum as an attorney's fee therefor as to the court should seem just and reasonable, not to exceed ten per cent. on the amount of said note and interest thereon; that the sum of one hundred dollars is a reasonable sum for such attorney's fee for the foreclosure of said mortgage, and which said sum plaintiff has agreed with his attor-
76 ney for and become liable to him for; that said defendants are now working and mining said Sharktown and Scratch Awl lodes and extracting and taking therefrom large quan-

tities and amount of ore and milling and working the same and appropriating the proceeds thereof to their own use and not paying any portion thereof to plaintiff on said note, and that said lodes are valuable only for the said metals which the ore thereof contains, and that if said ores are taken from said lodes plaintiff's security will thereby be impaired; that said lode- other than said ores last named are undeveloped and of uncertain value, and that plaintiff has no security for said demand save and except said property described in said mortgage, and that said tunnel is of no value save and except for the purpose of working said mine. Wherefore plaintiff prays judgment for said sum of fourteen hundred and thirty-seven & $\frac{3}{100}$ dollars and interest thereon from the 17th day of January, 1879, at two per cent. per month and costs of suit and
77 for said sum of one hundred dollars attorney's fee for the foreclosure of said mortgage and for a receiver to be appointed by the said court or judge thereof to take charge and possession of the proceeds of said mine and to account and pay out and disburse the same as said court may order and direct; and that said mortgage be foreclosed and said mortgaged property be sold by the sheriff of said county, and the proceeds of said sale be applied to the payment of any judgment plaintiff may obtain in this action and cost of sale, and that said defendants be forever barred and foreclosed of any and all rights and equities in and to said property, save and except the statutory right of redemption and for such other and further relief as to the court may seem meet in the premises.

(Signed) J. C. ROBINSON,
Att'y for Plaintiff.

TERRITORY OF MONTANA, } ss:
County of Deer Lodge. }

Henry Schnepel, being duly sworn, on oath says that he is the plaintiff above named and has heard read the foregoing com-
78 plaint and knows the contents thereof, and that the facts therein stated are true of his own knowledge.

HENRY SCHNEPEL.

Subscribed and sworn to before me this thirty-first day of May, 1879.

JOSIAH M. MERRILL,
Notary Public.

An order of sale in same case, which is as follows:

79 In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

HENRY SCHNEPEL, Plaintiff,
vs.
HUGH T. MURRAY & JAMES E. DURFEE, Defendants.

Now comes the defendants above named and demurs to plaintiff's complaint herein, and as grounds thereof assigns:

1. That said complaint as to the first cause of action therein

attempted to be set forth does not state facts sufficient to constitute a cause of action.

2. That said complaint as to the second cause of action therein attempted to be set forth does not state facts sufficient to constitute a cause of action. Wherefore defendants ask judgment for their costs.

THOMAS L. NAPTON,
Att'y for Defendants.

80 In District Court of the Second Judicial District of the Territory of Montana, in & for the County of Deer Lodge. September Term, A. D. 1879.

HENRY SCHNEPEL, Plaintiff,

vs.

HUGH T. MURRAY *et al.*, Defendants.

MONDAY, *September* 1—10 a. m.

Present: Hon. Wm. J. Galbraith, judge, presiding; George W. Irvine, clerk.

Now comes Thos. L. Napton, Esq., counsel for defendants, and withdraws the demurrer of defendants and his appearance as counsel therein. And now comes J. C. Robinson, Esq., counsel for plaintiff, and moves the court for a default herein, and it appearing to the court that the defendants in said cause having appeared by filing a demurrer to the complaint of plaintiff, and, by his counsel, said demurrer having been withdrawn, and said defendants having failed to make answer or other or further appearance, it is ordered

81 that the default of the defendants, Hugh T. Murray and James E. Durfee, be, and the same is hereby, entered herein.

A true copy.
Attest:

GEO. W. IRVINE, *Clerk*,
By A. S. HIGGINS, *Deputy*.

For the District Court of the Second Judicial District of the Territory of Montana, in and for the County of Deer Lodge.

HENRY SCHNEPEL, Plaintiff,

vs.

HUGH T. MURRAY & JAMES E. DURFEE, Defendants.

The people of the Territory of Montana to the sheriff of Deer Lodge county, Greeting:

Whereas on the 11th day of September, A. D. 1879, the above-named plaintiff recovered a judgment and decree in the second judicial district court of the Territory of Montana, in and for the county of Deer Lodge, against Hugh T. Murray and James E. Durfee, defendants in an action wherein Henry Schnepel was the plaintiff, and Hugh T. Murray and James E. Durfee were the defendants,

and which said judgment and decree was thereafter regularly
82 entered at page — of judgment "B" of the records of said court, and is in words and figures following, to wit:

For the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

HENRY SCHNEPEL, Plaintiff,
vs.
HUGH T. MURRAY & JAMES E. DURFEE, Defendants.

At a regular term of said court, begun and holden at the court-house of said county on the 1st day of September, 1879, Honorable William J. Galbraith presiding—

Said cause came regularly on for hearing on the complaint therein, and said defendants having appeared in said cause and filed a demurrer to said complaint, and said demurrer having been withdrawn and no further action or proceedings had by said defendants, and their default having been duly entered, and it appearing to the court that there is now due and owing from said defendants
83 to plaintiff on said promissory note set out in said complaint the sum of eight thousand eight hundred and fifty-three & $\frac{67}{100}$ dollars, and, upon proof being made, the court further finds that the sum of three hundred and fifty dollars is a reasonable amount for an attorney's fee in foreclosing said mortgage set out in said complaint: Therefore, on motion of J. C. Robinson, esq., attorney for the plaintiff, it is ordered and adjudged that the plaintiff, Henry Schnepel, have and recover of said defendants, Hugh T. Murray and James E. Durfee, judgment for the sum of nine thousand two hundred and three and $\frac{67}{100}$ dollars ($9,203.67) and costs of suit, taxed at thirty-seven and $\frac{45}{100}$ dollars. And it is further ordered, adjudged, and decreed that said mortgages described in plaintiff's complaint be foreclosed, and that said property therein described, to wit, all that certain quartz lead, lode, or vein bearing silver and other metals, and known, designated, and recorded in the books of records of quartz lodes of said Deer Lodge county, Montana Territory, by said Durfee, on the 5th day of January, 1875, in book F of quartz lodes, page 298, as the Sharktown
84 lode, and being 1,500 linear feet on and along said lode and 325 feet wide, and for a more particular description thereof reference is hereby made to said record above referred to; also all that portion of that other certain quartz lode, lead, or vein bearing silver and other metals, and being known, designated, and recorded in the books of record of quartz lodes of said Deer Lodge county on the 22nd day of June, 1867, as the Navejo lode, and being claim number one northwest and discovery claims on said lode; also the other certain quartz lode, lead, or vein bearing silver and other metals, and known, designated, and recorded in the books of records of quartz lodes above named by said Durfee on the 19th day of January, 1875, on page 331 thereof as the Scratch Awl lode, and being 1,500 linear feet on and along said lode and 312 feet wide, and for a more particular description of said

property reference is hereby made to said record above referred to, located by Dr. H. Crepin, and claim No. one, east of dis-
85 covery claim, located by Wm. Hardenbrook; of discovery number two, east of discovery claim on said lode, located by James H. Brown, and all of which said above-named claims on said last-named lode being two hundred linear feet on and along said lode and being in all eight hundred feet; also that certain tunnel run by said Murray and Durfee to tap and intersect said above-described Sharktown lode; also that other certain quartz lode, lead, or vein, situate in the same district, &c., bearing silver and other metals, located and recorded in books of record of quartz lodes of said Deer Lodge county and in book J, on page 198, on the 30th day of January, 1878, as the "Blackmail lode," and being 1,500 linear feet on and along said lode and sixty feet wide, and located by said Murray and Durfee, and for a further and more particular description of said lode reference is hereby made to said record thereof, and all of which said above-described property is situated and being in Flint Creek mining district, Deer Lodge county, Montana Territory, and with all improvements, rights, and priv-
86 ileges on or in any way belonging to or any of said property above described or appertaining thereto; that said above-described property be sold by the sheriff of said county as by law required for the sale of such property and the proceeds of such sale be applied to the payment of said sum above named in the decree and costs of sale, and the surplus, if any, be deposited with the clerk of said court for the use and benefit of said defendants, and if the proceeds thereof be insufficient to pay said sums named in this decree that said plaintiff have execution for such balance due after such sale; that said defendants and all persons claiming title or any of said property under them be forever barred and foreclosed of any and all right or interest therein, save and except the statutory right of redemption, and in case of failure to redeem said property said sheriff will execute a deed to such purchaser or party holding said sheriff's certificate of sale of said property, and on application the clerk of said court will issue a writ of assist-
87 ance, and said party holding said deed or his guarantee will be put and let in possession of said property.

Dated September 11, 1879.

WM. J. GALBRAITH,
Judge of Said Court.

Now, therefore, you, the said sheriff, are hereby commanded and required to proceed to notice for sale and to sell the premises described in said judgment and decree, and apply the proceeds of said sale as in said judgment and decree directed, and to make and file your report of sale with the clerk of this court within sixty days from the date of your receipt hereof, and do all the things according to the terms and requirements of said judgment and decree and the provisions of the statute in such cases made and provided.

Witness the Hon. Wm. J. Galbraith, judge of said court, the hand

of the clerk of said court, this the 24th day of September, A. D. 1879, and the seal of said court affixed on this date.

[SEAL.] GEO. W. IRVINE, *Clerk.*

88 The *præcipe* for order of sale in same case, a stipulation in same case, the oath of the receiver, the order appointing a receiver in same case, and the order to show cause in same case, all of which are as follows:

In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

HENRY SCHNEPEL, Plaintiff, *vs.* HUGH T. MURRAY *et al.*, Defendants.

The clerk of said court will issue an order of sale on the decree in the above cause and give the same to the sheriff.

J. C. ROBINSON,
Att'y for Plaintiff.

Stipulation.

In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

HENRY SCHNEPEL, Plaintiff,

vs.

89 HUGH T. MURRAY and JAMES E. DURFEE, Defendants.

It is hereby stipulated by and between the plaintiff and defendant- in the above-entitled action that as said plaintiff has made an application to the judge of said court for the appointment of a receiver in said cause to take charge of the proceeds of the mines in plaintiff's complaint described, and that for the purpose of saving costs of said application that a receiver be appointed by the judge of said court to work said mine in said complaint described, to mill the ore therefrom, and to pay all expenses thereof, including rent of mill and everything pertaining to such mining and milling, and to account to the court for the net proceeds thereof, as in other cases of receivers; and it is further stipulated that J. M. Merrill be appointed such receiver, who, upon being duly appointed by the judge of said court, shall take the oath by law required and shall act without bond being required of him.

Dated Aug. 4, 1879.

J. C. ROBINSON,
Attorney for Plaintiff.
THOS. L. NAPTON,
Att'y for Defendants.

90 *Oath of Receiver.*

In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

HENRY SCHNEPEL, Plaintiff,
vs.
HUGH T. MURRAY & JAMES E. DURFEE, Defendants.

TERRITORY OF MONTANA, *Deer Lodge County:*

I, J. M. Merrill, being duly sworn, says on oath that he is the party named as receiver in said cause; that he will well and truly discharge all the duties by law imposed on him as such receiver to the best of his knowledge and ability.

J. M. MERRILL.

Subscribed and sworn to before me this 7th day of August, A. D. 1879.

J. A. QUINN,
Justice of the Peace.

Order Appointing a Receiver.

91 In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

HENRY SCHNEPEL, Plaintiff,
vs.
HUGH T. MURRAY and JAMES E. DURFEE, Defendants.

Whereas the above-named plaintiff has commenced an action in said court against said defendants to foreclose a mortgage on the property hereinafter named, and has applied to the judge of said court for an order appointing a receiver to take charge of said mine and the proceeds thereof; and whereas said plaintiff and defendants have filed in said cause their stipulation for the appointment of such receiver, and that J. M. Merrill is so appointed: Now, therefore, by authority of law and by virtue of such stipulation, and in accordance therewith, it is ordered that said J. M. Merrill be, and he is hereby, appointed a receiver to take charge of the property described in plaintiff's complaint and now being worked and mined by said defendant, and from which ores are being taken by
92 them and being milled and worked and all ores taken therefrom, and on the dump thereof, or at the mill where being worked, to wit: Those certain quartz lodes or veins situated and being on Flint Creek mining district, in Deer Lodge county, Montana Territory, and being that certain lode or vein known and recorded in the books of records of quartz lodes of said county as the Sharktown and Scratch Awl lodes, and also the Blackmail lode in said district.

That said receiver is hereby ordered and directed to forthwith, and as soon as he shall have received a certified copy of this order, and shall have taken the oath required by law, proceed to take

charge of said property and to mine the same as and in the same way and manner as said defendants are now doing, and in like manner to mill the ore therefrom, and from such proceeds pay all expenses necessary and incident thereto, and including the rent of the mill, and the proceeds thereof, over and above said expenses, keep and hold subject to the order of said court.

Dated Aug. 6, 1879.

WM. J. GALBRAITH,
Judge 2nd Judicial District.

93 *Order to Show Cause.*

In District Court, Second Judicial District, Deer Lodge County, Montana Territory.

HENRY SCHNEPEL, Plaintiff,
vs.
HUGH T. MURRAY & JAMES E. DURFEE, Defendants.

It appearing from the complaint on file in the above-entitled action that said defendants are working and mining the property therein described and converting and appropriating the proceeds of said mine to their own use, and not applying any of the same to the payment of said mortgage debts, and that they have no other means than said property, and that said plaintiff is entitled to have a receiver appointed, as prayed for in said complaint: It is therefore ordered that said defendants be and appear before me, the undersigned, the judge of said court, on Saturday, the 9th day of August, 1879, at 10 o'clock a. m., to show cause, if any they have, why an order should not be made appointing a receiver to take charge
94 of the proceeds of said mines described in plaintiff's complaint.

The hearing of said matter will be at the chambers of said judge in the town and county of Deer Lodge, said Territory of Montana.

Dated this 4th day of August, 1879.

WILLIAM J. GALBRAITH, *Judge.*

To all of which defendants object, for the reason of irrelevancy and they are calculated to mislead and prejudice the jury, and which said objection was overruled by the court and all of said papers introduced in evidence.

21. James E. Durfee, one of said defendants, was called and sworn as a witness on behalf of defendants, and was asked the following question: "What did you do in reference to the location of the Scratch Awl and Sharktown lodes?

To which the plaintiff objected, and which objection was sustained by the court and said ruling excepted to by the defendants.

22. Said witness Durfee testified that he was familiar with the character of the mines in the Flint Creek mining district,
95 where said mines in dispute *is* situated, and was then asked by his counsel to "state from your knowledge of quartz mines

and the mines in that district if there are croppings of a vein running east and west and crossing the Salmon vein."

To which plaintiff objected, and which objection was sustained by the court, and the ruling of the court was excepted to by the defendants.

23. Said witness Durfee was asked by his counsel as follows: "State whether or not there was ore in the stope," referring to a stope of defendants in what they claimed as a lead running east and west and across the Salmon vein and claimed by defendants as the Scratch Awl vein.

To which said question the plaintiff objected as being leading, and which said objection was sustained by the court, and which said ruling of the court was excepted to by the defendants.

24. Said witness Durfee was asked by his counsel as follows:

"State who for the past five years has worked that mine" (referring to the premises where the trespass is alleged to have been
96 committed), "all east of a perpendicular line projected from the turn-table."

To which said question the plaintiff objected, and which said objection was sustained by the court, and the said ruling of the court was excepted to by the said defendants.

Said witness Durfee was by his counsel asked as follows:

"Have defendants Murray and Durfee continuously worked the ground in which said trespass is alleged to have been committed since July, A. D. 1879?

To which question the said plaintiff objected, and which said objection was sustained by the court, and the said ruling of the court was duly excepted to by the said defendants.

26. The said defendant Durfee, the witness under examination, while being so examined in chief by his attorney, was asked as follows, to wit:

"Had you any conversation with the plaintiff Pardee, in the fall of A. D. 1876, in reference to the location of the Sharktown and Scratchawl lodes?

Which defendants' attorney stated was for the purpose of impeaching the credibility of said Pardee as a witness, and which said question, for the purpose stated, was objected to by the said
97 plaintiff as being upon a collateral matter, and which said objection was sustained by the court, and which said ruling of the court was then and there duly excepted to by the defendants

27. Said witness Durfee was then asked as follows:

"Is there a lead running across the Salmon lead, east or west?

Which said question was objected to by the plaintiff as being leading, which said objection was sustained by the court, and which said ruling was duly excepted to by the defendants.

28. J. M. Merrill, one of the defendants, was called, sworn, and

examined as a witness on the part of the defendants, and was asked by his attorney as follows:

"While you was receiver how did Murray and Durfee work for you—as employés?"

Which said question was by the plaintiff objected to, and which said objection was sustained by the court, and to the ruling of the court thereon the said defendants duly excepted.

29. George W. Jones was introduced and sworn and examined as a witness for the said defendants, and thereupon was asked as follows, to wit:

"Which way does the ore in the Trout mine run?"

98 Defendants' counsel stated that the object of the testimony was to show that the ore in this district runs east and west, as it does in the Scratch Awl lode. Plaintiff objected to the testimony, and the objection was sustained by the court, and which said ruling was duly excepted to by the defendants.

30. The defendants offered to prove by Thomas Coulter and George W. Jones what the Speckled Trout, Pocahontas, Cliff, and other paying veins which are in the immediate vicinity of the vein in litigation run east and west, and that the country rock through which they run runs north and south, and that the formation of the country rock of these veins is the same as of the vein in question, for the purpose of showing the probability of the existence of [a] separate vein, which defendants call the Scratch Awl vein, and to show the direction of the Scratch Awl vein, and for the purpose of showing that the cross-ones running north and south are not properly lodes.

To which said question the plaintiff objected, and which said objection was sustained by the court, and which said ruling of the court thereon was *was* duly excepted to by the defendants.

99 31. Philip Cain was called and sworn by the defendants, and examined and testified that he knew where the Cliff Extension shaft cut a vein running east and west, and was asked as follows:

"What locations are there at the crossing, and in what direction do they run?"

To which question the plaintiff objected, and the said objection was sustained by the court, and the said ruling of the court thereon was duly excepted to by the defendants. Defendants' attorney stated that the object of the testimony sought to be elicited from the witness was to show that at the point where the plaintiff had been working is a recognized cross-lead.

32. Said witness Cain stated that he had been to the Estell lode, and was by the defendants' attorney asked as follows:

"State what you saw in reference to a lead running across the Salmon croppings at the Estell?"

To which question the said plaintiff objected, and which objection

was sustained by the court, and which said ruling of the court was duly excepted to by the defendants.

100 33d. Defendants called as a witness Thomas Ryan, who was sworn and examined, and who testified to having worked on the tunnel level of defendants, and who was by defendants' counsel asked to state whether or not, in his opinion, this ore which he had traced the whole length of the tunnel level is a vein.

To which question the plaintiff objected, and the said objection was sustained by the court, and the said ruling of the court thereon was duly excepted to by the defendants.

34. Chris. Hart was sworn and examined as a witness for the defendants, and was asked as follows, to wit:

"State whether or not there is a lead running east or west in the tunnel lead."

To which said question the plaintiff objected, and the said objection was sustained by the court, and the said ruling of the court was excepted to by the defendants.

35. Hugh T. Murray, one of the defendants, was sworn and examined as a witness for the defendants, and was asked as follows by his attorney:

"Where did you first commence working in the Scratch Awl lode?"

101 Which said question was objected to by the plaintiff, and which said objection was sustained by the court, and to which said ruling of the court the defendants then and there duly excepted.

36. That said defendants, for the purpose of showing that the work done by them, alleged to be a trespass, was work done upon a lead claim located by them upon the surface as the Scratch Awl lode, and for the purpose of showing the character of possession and character of claim to the property und- which such work was done, inquired of their witnesses, Murray, a defendant in this case and one of the claimants to the property, as follows, to wit:

"State when you first commenced work in the Scratch Awl lead, if at all, and under what claim of title, if any, did you so commence, and how long did you continue such work, and for how long prior to the date of the alleged purchase of the same by the plaintiff in his supplemental complaint.

Which said questions were severally and collectively objected to by the plaintiff, and which said objections were sustained by
102 the court, and to which said ruling of the court thereon the said defendants then & there duly excepted.

37. Said witness Murray was asked by his counsel as follows, to wit:

"How much money have you and Durfee expended on the Scratch Awl lode?"

Which said question was objected to by the plaintiff, and the said

objection was sustained by the court, and which said ruling of the court was then and there duly excepted to by the defendants.

38. For the purpose of showing that these defendants, in doing the work complained of as a trespass, *was* working within the boundaries and upon the lead they claimed as the Scratch Awl lead, — asked said witness Murray as follows, viz:

"State where the level running east, called the Scratch Awl level, is in reference to the surface location of the Scratch Awl location."

To which said question the plaintiff objected, and which said objection was sustained by the court, and which said ruling of the court was at the time duly excepted to by the said defendants.

103 39. Said witness Murray was asked by his counsel as follows, to wit:

"Is there any foot wall or any hanging wall of a vein running north and south?

To which said question the plaintiff objected, which said objection was sustained by the court, and which said ruling of the court in sustaining said objection was by the defendants then and there duly excepted to.

40. Said witness Murray was asked by his counsel the following question, to wit:

"State whether or not there is a foot wall or a hanging wall between the turn-table and the granite near the end of the tunnel level?

To which said question the plaintiff objected, and which said objection was sustained by the court, and to which ruling of the court the said defendants at the time duly excepted.

41. Said witness Murray was then asked by defendants' attorneys the following question, viz:

"What did you do as to staking off the Scratch Awl lode?

Which said question was asked for the purpose of proving
104 that the defendants have been in possession under a claim of title, and which said question was objected to by the plaintiff, and the said objection was sustained by the court, to which said ruling of the court in sustaining said objection the defendants at the time duly excepted.

42. Said defendants offered in evidence the record of Deer Lodge county, of the location of the Scratch Awl lode and Sharktown lode.

Which was objected to by the said plaintiff, which said objection was sustained by the court, and the ruling of the court in sustaining said objection was by the defendants at the time duly excepted to.

43. For the purpose of showing that at the time of the commission of the alleged trespass and before and since said time they,

the defendants, were in adverse possession of the premises, said witness Murray was asked the following question, to wit:

By DEFENDANTS' COUNSEL: "State where, in reference to the surface location of the Scratchall lode, you worked in July and August, 1879.

105 And which said question plaintiff objected to, and which said objection was sustained by the court, which said ruling of the court in sustaining said objection was by the defendants at the time duly excepted to.

44. Said witness Murray was asked by the attorneys for the said defendants the following question, to wit:

State what, if any, conversation you had with Holland and Estell, or either of them, prior to their conveyance to the plaintiff, in reference to you and Durfee working on their, the Salmon, mine, and the extent of the limits of the Salmon vein on the east.

Which said question was objected to by the plaintiff, and which said objection was sustained by the court, and which said ruling of the court in sustaining said objection was by the defendants at the time duly excepted to.

45. Said witness Murray was then asked by the attorney for the defendants the following question, to wit:

"State what conversation, if any, you had with Holland and Estell, or either of them, while they were in the possession of
106 the Salmon mine and prior to the time of their conveyance to the plaintiff, and about the time you commenced work on the Scratchall vein as to the extent of the Salmon mine on the east?" Which evidence the defendants' attorneys offered for any purpose which is legal, and which said question the plaintiff objected to, and which said objection was sustained by the court, and which said ruling of the court in sustaining said objection was, by the defendants, at the time duly excepted to.

46. Charles Clark was then sworn and examined as a witness for the defendants, and, after testifying to his knowledge of mining, he was asked by the defendants' counsel as follows:

"Is metamorphic lime vein matter?"

And which said question was objected to by the plaintiff, and which said objection was sustained by the court, which said ruling of the court in sustaining said objection was, by the defendants, at the time duly excepted to.

47. Said witness, on cross-examination, was asked by the plaintiff as follows:

107 "What is, historically, the greatest width of the Comstock lode?"

Which said question was objected to by the defendants as not being proper cross-examination, and to having no relevancy to the case, and which said objection was overruled by the court; to which said ruling of the court the said defendants then and there duly ex-

cepted, when said witness said and answered said question that he had seen it stated as high as 300 to 600 feet.

48. U. B. Ringling was called, sworn, and examined as a witness for defendants, and testified as to the correctness of certain maps made by him for the defendants; that he was a civil engineer, and which said maps so testified to were used by defendants before the jury for the purpose of explanation, and on cross-examination by the plaintiff said witness was asked as to certain maps used before the judge of said court on an application for an injunction and not used at the trial, or in any way referred to by the defendants at the trial, and said last-named maps produced by witness and
108 offered to witness and before the jury, and witness asked as to said maps as follows, to wit:

"Is that a correct representation of the end of the tunnel lead, and what is the variation between that point" (pointing to the maps last referred to) "of the winze and the tunnel lead?"

To the production of said maps to the jury and said testimony the defendants objected, for the reason said testimony was not cross-examination and said maps were not referred to in any way by the defendants on direct examination, and which said objection was overruled and said ruling excepted to by the defendants.

When said maps were produced to the jury and explained to the jury, but not offered in evidence, and said witness proceeded to explain as to the same.

49. L. A. Brown was asked on direct and cross examination as to seams which the said plaintiff claimed to be the foot wall of the Salmon mine, and was asked by the defendant as follows:

"Are these seams any evidence of a foot wall of a vein?"

109 To which said question the plaintiff objected, and the said objection was sustained by the court, and the said ruling of the court thereon was excepted to by the defendants.

50. James W. Estell was called by the plaintiff as a witness in rebuttal, and was interrogated as follows, to wit:

"What do you know, if anything, of there being a crossing vein at the Salmon mine?"

To which question the defendants objected as not being in rebuttal, and which said objection was overruled by the court, and said ruling of the court was then and there excepted to by the defendants.

When the said witness answered:

I know nothing which indicates a cross-lead there. There is a streak there within 4 or 5 feet of ore west of the croppings. It shows different stains from the other croppings. There are no croppings which indicate a cross-lead and no evidence of a cross-lead in the incline, and on west side of the incline were no evidences.

Defendants offered in evidence before they closed their testimony the complaint in the case of No. 1399 in this court, and which
110 said complaint is as follows:

Complaint.

In the Justices' Court of Phillipsburg Township, Deer Lodge County, & Territory of Montana.

JAMES K. PARDEE, Plaintiff,

vs.

HENRY SCHNEPEL, JOSIAH M. MERRILL, J. E. DURFEE, and HUGH T. MURRAY, Defendants.

James K. Pardee, the plaintiff in this suit, complains of Henry Schnepel, Josiah M. Merrill, receiver; J. E. Durfee, and Hugh T. Murray, the defendants, residents of said county and Territory, and for cause of complaint shows that at the time of commencing of the wrongs hereinafter complained of he was and for a long time before that had been in the peaceable and quiet possession of, and is still entitled to the possession of, that certain piece or parcel of quartz mining ground lying and being situate in Flint Creek mining district, county and Territory aforesaid, and known as the Sal-
111 mon mine; and the said plaintiff further alleges that being so in the peaceable and quiet possession of said described premises, and entitled to the possession of the same, the said defendants, on the 18th day of August, 1879, with great force and violence, and with a multitude of people, and with force of arms, unlawfully entered on said described premises, and with force, arms, and threats of violence removed, put out, and expelled the said plaintiff therefrom and took possession of the same, and the said Henry Schnepel, Josiah M. Merrill, receiver; J. E. Durfee, and Hugh T. Murray have ever since illegally, forcibly, and unlawfully detained possession of the same from plaintiff, to his great damage, to wit, in the sum of one hundred dollars.

Plaintiff therefore prays for judgment against the said defendants for the restitution of the above-described premises, and for damages suffered by said plaintiff by said forcible and unlawful entry upon, and forcible and illegal detention of, the above-described premises, and that said damages may be trebled, and for such other
112 and further relief as by law and right he may be entitled to, and for his costs in this behalf expended.

JAMES K. PARDEE.

PHILLIPSBURG TOWNSHIP,
County of Deer Lodge, Territory of Montana, } *ss:*

James K. Pardee, the plaintiff, being duly sworn, deposes and says that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

J. K. PARDEE.

Subscribed and sworn to before me this 19th day of August, A. D. 1879.

J. A. QUINN,
Justice of the Peace.

Filed, &c.

113 For the purpose of showing and establishing the fact that the defendants were in possession of the *locus in quo the alleged trespass was committed* at the time the alleged trespass was committed, to show adverse possession of the same mine when the trespass was alleged to have been committed.

To the introduction of which the plaintiff objected, and which said objection was sustained, and which said ruling was excepted to by the defendants.

52. J. K. Pardee, the plaintiff, was then called in rebuttal and asked by the counsel the following question, to wit:

"Describe the Scratch Awl discovery and the accompanying excavations."

Which said objection was objected to by the defendants as not being in rebuttal, and said witness having before fully gone into said subject-matter, — asked as to which said objection was overruled by the court, and said ruling of the court was duly excepted to by the defendants, and said witness proceeded to testify and describe said shaft.

114 (Signed) WILLIAM J. GALBRAITH, *Judge.*

5th June, 1880.

53.

In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY *et al.*, Defendants.

Be it remembered that on the trial of this cause one of said defendants, a witness in his own behalf, having testified that one Estell was a predecessor in interest of the alleged "Salmon" mining claim—that in 1878, while he was owner and in possession of said lode, he had a conversation with said Estell in reference to the extent of his said claim in an easterly direction—was asked by said defendants the following question, to wit:

"State if your conversation with said Estell was in reference to the extent of his said claim and the limits of the same."

115 Which said question was objected to by the plaintiff, and thereupon defendants referred the court to section 603 of the Civil Practice act of 1877. Whereupon the court inquired of counsel the purpose of introducing or offering said evidence. Whereupon counsel stated to the court that it was offered for all legitimate

purposes under the said statute and issues joined, and declined, upon request of the court, to further state the purposes of offering said evidence. Whereupon the court sustained the objection to said evidence and did not permit said witness to answer said interrogatory.

To which the defendants then and there and at the time duly excepted, and this their bill of exceptions is then and now signed, sealed, and made a part of the record herein, this June 1st, A. D. 1880.

(Signed) WM. J. GALBRAITH, [SEAL.]
Judge 2nd Judicial Dist., M. T.

116 In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY *et al.*, Defendants.

54. Be it remembered that on the trial of this cause, and under the issues found therein, after the plaintiff had introduced evidence showing, or tending to show, title and prior possession of the property in controversy, defendants, on their part, for the purpose of establishing their title and extent and character of their possession and claim to the property in question, as well as the date and inception thereof, and for each or either and all of said purposes, offered in evidence the record made of the Scratch Awl and Sharktown lodes, which are in words and figures as follows, to wit:

117 *Sharktown Lode.*

This lode is located in Flint Creek mining district, Deer Lodge county, Montana Territory, distant from the town of Phillipsburg about one and one-half miles in a southeasterly direction, and distant from discovery shaft of the Salmon lode about one hundred feet in an easterly direction, the course of said lead being northerly and southerly from the discovery, was discovered on the second day of January, in the year of our Lord one thousand eight hundred and seventy-five, by J. E. Durfee, and is claimed as follows, to wit: Commencing at the center of the discovery shaft and running one thousand feet in a southerly direction and five hundred feet in a northerly direction from the center of said shaft, and westerly twenty-five feet to surveyed line of the Salmon lode, and easterly three hundred feet, making in all a strip or tract of land one thousand five hundred feet long by three hundred and twenty-five feet wide, through which veins the said Sharktown lode.

118 Now, therefore, we, the said J. E. Durfee, do publish and declare that he has a valid right to the possession and enjoyment to said Sharktown quartz lode or mineral vein, together with all and singular the surface and undiscovered mineral veins or lodes lying beneath it within the boundaries of said strip or tract of land, which is plainly marked on the surface, and that this said location is made after having made a *bona fide* discovery on said Sharktown

lode or mineral vein, as required by existing laws of the United States and of Montana Territory.

J. E. DURFEE.

TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

J. E. Durfee, the above-named claimant, do solemnly swear that the facts stated in the foregoing declaration are true, and that he is a *bona fide* resident of the Territory of Montana and a citizen of the United States.

(Signed) J. E. DURFEE.

Subscribed and sworn to before me this 2nd day of January, A. D. 1874.

J. M. MERILL,
Justice of the Peace.

119 Filed for record January 5th, A. D. 1875, at 7½ o'clock p. m.

H. S. CLARK,
County Recorder.

Scratchall Lode.

This lode is situate in Flint Creek mining district, Deer Lodge county, Montana Territory, and about one mile easterly from the town of Phillipsburg, on "Trout Hill;" was discovered on the second day of January, A. D. 1875, by J. E. Durfee, who claims four hundred linear feet west from the center of discovery shaft, and one thousand one hundred linear feet east from the center of said shaft, and twelve feet south from the center line to the line of the "Navajo lode," and three hundred feet long from said center line, the entire length of said lode claims making a strip or tract of land one thousand five hundred feet long by three and twelve feet wide, through which runs the said Scratchall lode.

Now, therefore, I, the said J. E. Durfee, do hereby publish
120 and declare that I have a valid right to the possession and enjoyment of all that certain strip or tract of land above described, together with all and singular the lodes or mineral veins lying beneath it not previously claimed; and that this said location is made after having first made a *bona fide* discovery on said vein and having otherwise complied with the laws of the United States and of Montana Territory relating thereto.

J. E. DURFEE.

TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

J. E. Durfee, being sworn, on oath says that he is the above-named claimant; that he is a citizen of the United States and a *bona fide* resident of the Territory of Montana, and that the matters and things stated in the above declaration are true.

J. E. DURFEE.

Subscribed and sworn to before me this 9th day of January, A. D. 1875.

J. M. MERILL,
Justice of the Peace.

121 Filed for record January 19, A. D. 1875, at 8 o'clock p. m.
H. S. CLARK,
County Recorder.

To which plaintiff objected, which said objection was sustained by the court, and said records not admitted in evidence; to which ruling of the court the defendants then and there duly excepted.

And the said defendants also offered the same in evidence as a link in the chain of testimony showing an adverse possession of said property under the statute of limitations of the Territory, which was likewise objected to by said plaintiff, said record excluded, and to which the defendants then and there duly excepted.

55. And said defendants for each of the purposes aforesaid, severally and separately, and for all said purposes as a whole and for the purposes of showing a valid location of the said lodes upon the surface thereof, inquired of Hugh T. Murray, a witness for the
122 defendants, and one of the persons locating and making said locations, as follows:

"State what you did with reference to locating or marking out said claims on the surface, if anything, and when, if at all, it was done."

Which said question was objected to by the plaintiff, which said objection was sustained by the court, and said witness not permitted to answer the same; to which ruling of the court the said defendants then and there duly excepted.

And said defendants had already introduced evidence showing or tending to show that the work done constitut*ing* the alleged trespass directly beneath the surface ground of the said Scratchall lode, and that a winze and perpendicular shaft from the surface connected said works, and that defendants had worked and mined the same since 1877; and notwithstanding such state of facts the court refused to admit said evidence for the purpose aforesaid, or for any of the purposes aforesaid; to all of which defendants then and
123 there duly excepted *to;* and this his bill of exceptions is signed, sealed, and made a part of the record in this case.

This June 3d, A. D. 1880.

(Signed) WM. J. GALBRAITH, [SEAL.]
Judge 2nd District, M. T.

In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY *et al.*, Defendants.

Be it remembered that on the trial of this cause, for the purpose

of showing an adverse possession of the property upon which the trespass was alleged to have been committed under a *bona fide* claim of right and title and color of title thereto, defendants offered to prove, by Hugh T. Murray, one of the defendants herein, being a witness on behalf of the defendants, and other evidence as follows, to wit:

1st. The location and working out of the boundaries of the
124 Scratchall lode upon the surface thereof long prior to the alleged purchase or contract to purchase by plaintiff of the alleged Salmon lode claim.

2. That thereafter a record was duly made of said location, which was produced in court and offered in evidence.

3. That afterwards, in the year- A. D. 1877 and 1878, said defendants, under claim of title to said lode, did sink a winze and shaft from the surface and inside of said location upon the said vein or lode so located perpendicularly to the point under ground from which the alleged trespass was committed, and that the ore taken out was on said vein and directly underneath the surface location.

4. That all the work was done and quartz extracted by the defendants in virtue of this claim to said lode.

5. That said defendants, since said location and recordation of said lode claims, continuously possessed and worked the same from the year 1877 up to the commencement of this suit, and are now in possession thereof under this claim of title as aforesaid.

125 And all of said evidence being so offered by the said defendants for the sole purpose of showing adverse possession of said property under this claim of title at the time of the alleged trespass; that they held such possession at the time of the commencement of this action, were still in such possession, and that the working and mining thereof constituted said trespass.

The same was objected to, and each and all thereof severally and separately, as incompetent for the said purpose for which it was so separately and as a whole offered. Which said objection, in so far as the particular purpose for which said evidence was so offered, was sustained, and said evidence, and each and every thereof, not admitted for said purpose.

To each and all of which the defendants then and there duly excepted, and this their bill of exceptions is now at the time signed, sealed, and made a part of the record herein this 1st day of June, A. D. 1880.

(Signed) WM. J. GALBRAITH, [SEAL.]
Judge of the 2nd Judicial District of Montana Territory.

126 The court erred in giving the instructions given on behalf of said plaintiff and in refusing to give the instructions asked by the defendants and refused, for the reasons assigned and as appears in defendants' exceptions to the giving and refusing thereof, duly filed, &c., and which is as follows, to wit:

In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY *et al.*, Defendants.

Now comes the defendants, and before the reading of the instructions asked for by the plaintiff, and before the submission of the cause to the jury, and object to the following of said instructions, to wit:

To the 1st instruction, because it ignores the question of possession as owner and does not involve an actual possession and is misleading.

To the second instruction for the same reason, and because
127 it ignores any adverse possession by another, which is one of the issues of the case.

To the third instruction, because the evidence did tend to show that the location and record of the defendants was across a portion of the patented ground.

To the 4th instruction for the reason assigned to all the former instructions, and because it does not confine it to the side lines; embraces a cross-lode, in which case it is inapplicable; ignores an adverse possession at the time of the lease, and assumes that a recovery could be had by said lessor or plaintiff, when the entry was prior to his lease and because in such cases of an action by a lessee there must be an invasion of his possession subsequent to his lease, and assumes that if the entry was made by the defendants while the property was in possession of the owner before the lease, said plaintiff could recover for damages to the freehold, or for taking out rock or quartz after said lease, and because there is no evidence showing that the lease, if any, gave plaintiff a title to the ore taken out by another.

128 To the fifth instruction for the reasons before given, and because the owner of a cross-lead has the right to work through the lode it crosses without being a trespasser as to the possession of such lode, which is the gist of this action as well as the only one that can be maintained by a lessee, and assumes that such rock or ore at such crossing would inure to the benefit of the lessee, while it would go to the owner of the fee.

To the sixth instruction for all the reasons before given, and because it does not limit the trespass to the property or portion of it in the actual possession of the plaintiff.

To the seventh and eighth instructions, for that they do not define property, a lode, or vein of rock, ore, or minerals in the sense used in the statute of the United States and the laws of the Territory, and are too broad and misleading.

To the tenth instruction, because it assumes facts to exist, which is a question for the jury; assumes that they often exist, — is misleading, and takes several questions of fact from the jury;
129 is misleading and not in accordance with law, and because it ignores the question of value in mineralized rock ore, and on

account of the mineral as contradistinguished from such rock or ore, and urge the same objection to all instructions to which this is applicable and because it is indefinite as to the admissions as to whether it is a vein or chute.

To the fifteenth instruction, because it assumes to tell the jury that they must be guided by what they saw regardless of the evidence; that it is the most reliable, while it may or may not be in the light of the evidence of experts and others, — is misleading and not law.

To the 16th, 17th, and 18th instructions, because they do not properly define vein, or lode, or mineral-bearing rock in place, as defined by the act of Congress and the laws of the Territory, and because the same is misleading and *are* not law, and because they assume to determine what particular facts or condition of affairs will constitute a vein or lode, when the same may or may not be so, and give a state of facts as constituting a lode, which may or may not be so, and which might exist and yet be no lode or vein, or determine the extent of a claim thereon, and assumes that what may be evidence of certain facts actually constitute such facts, when it may or may not be so under all circumstances.

130

To the nineteenth instruction, 1st, because it ignores the possibility of an adverse possession of any of the Salmon lode or vein, if there is one, in the defendants; says to the jury that the possession of plaintiff is sufficient; it is misleading and not law.

To the twentieth instruction, for the reason assigned to the 17, 18, and 19th instructions.

To the twenty-first instruction, for the same reasons, and because it does not properly describe mineral-bearing rock in the sense used in the law, and does not properly describe a lode or vein in the sense used in the law.

To the twenty-second instruction, for the same reasons last and heretofore given, and because it is indefinite, vague, and misleading.

To the 23d instruction, because it assumes that if the apex or surface of the Salmon lode extends east to the granite, and that the Scratch Awl crossed the same and comes to the surface outside of said Salmon lode lines, that plaintiff is entitled to it—to the granite; because it assumes that if the lode of plaintiff is much wider than his location and comes to the surface outside of his side lines and extends east to the granite formation that the plaintiff is entitled to the cross-vein, when in such case his side lines become as to such cross-lode his end lines, and is misleading and does not correctly announce the law.

131

To the 24th instruction, — the reason that it improperly assumes to define a vein or lead and its boundaries, as well — the minerals it should contain to constitute a lode or vein, and that it is vague and indefinite.

To the 26th instruction, for the same reason as the 25th instruction, and for the further reason that it assumes a certain condition of affairs to facts, when they only are evidence of such facts.

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To the 27th instruction, for the same reason as to the 26th instruction.

To the twenty-eighth instruction, because it assumes to define mineral in its most enlarged sense, and does not at the same time inform the jury that such is not the sense used in the laws of the United States, and is therefore misleading.

To the twenty-ninth instruction, because it is misleading in that it does not throw the burden of proof on the plaintiff that he had a lode or vein, and that the same was trespassed on by the defendants, and improperly shifts the burden of proof.

To the thirty-first instruction, for the reason that it does not correctly state the law with reference to the boundaries of a claim or vein or lode, and assumes thereto no continuancy as to the property as to its possession, and assumes that a given state of facts constitutes possession within themselves, when they may or may
133 not and do not constitute possession in the case at bar, and ignores all adverse possession of the defendants, and is misleading otherwise.

To the thirty-third instruction, because it improperly states the law applicable in such case as affecting the question of boundary of claim and mineral deposits under the laws of the United States.

To the thirty-sixth instruction, for the reason that it excludes the idea of setting off *bona fide* improvements to damages for trespass.

That taking said instructions altogether they are inconsistent, misleading, and vague, and taken altogether they ignore entirely the existence of such lode, or what the defendants call the Sharktown lode, and running parallel with and east of said Salmon lode.

J. C. ROBINSON,
CHUMASERO & CHADWICK, AND
E. W. & J. K. TOOLE,
For the Defendants.

The foregoing objections were made to said instructions be-
134 fore said cause was submitted to the jury, or said instructions read to the jury and said objections overruled and duly excepted to before said cause was so submitted. And said defendants duly excepted to the refusal of the court to give each and every one of the instructions separately and severally, as well as each modification of each instruction offered by them and refused by the court.

This 5th day of June, A. D. 1880.

WM. J. GALBRAITH,
Judge Second Jud. District, M. T.

And which said instructions given at the request of the plaintiff are as follows, to wit:

135 *Plaintiff's Instructions.*

In the District Court, Second Judicial District, County of Deer Lodge, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY *et al.*, Defendants.

1. The first question for the jury to determine is: "Was there the plaintiff, James K. Pardee, in the actual possession of that piece or parcel of lode mining ground described in his complaint as the Salmon and Cliff Extension on the ninth day of August, A. D. 1879, and up to the 25th day of the same month?"

2. Any person who is in the actual occupation or use of any portion of a mining claim which is clearly marked off on the surface of the earth, so that its boundaries can be readily traced, is in the actual possesion of all said ground.

3. In this case it is conceded that the Salmon and Cliff Ex-
136 tension mining ground is patented mining ground, which had before the commencement of this action been surveyed and marked off by a United States deputy surveyor (mineral surveyor), and there is no evidence tending to show that the defendants wer- ever in the possession of any of the surface ground covered by said patent.

4. If you find from the evidence, by a preponderance thereof, that plaintiff was in the actual possession of the Salmon and Cliff Extension mining ground during such dates, and that he was there as the tenant of Eli D. Holland and James W. Estell, who were the legal owners thereof, then you are instructed that he was in the possession of all veins of ore or mineralized rock in place whose top or apex was inside of the surface lines of such mining ground, notwithstanding the same may have on its dip passed out beyond the surface lines thereof and extends in its downward course beneath other and adjoining lands; and the plaintiff would have the right to follow such vein or mineralized rock in place downward
137 as long as he can trace the continuity of the same.

5. Another theory the jury must observe is that under the law of Congress the plaintiff would be entitled to the possession of any cross-vein which passed through the mining ground of which he may have been possessed so long as the same remains within the walls of his vein of ore or mineralized rock in place.

Now, having determined whether or not the plaintiff was so in the possession of said premises, next you are to determine whether or not the defendant entered upon the same. If the defendants, by passing through the earth subter-aneously, entered upon the said vein of ore or mineralized rock in place where the top or apex is within the surface lines of plaintiff's mining ground then they are guilty of trespass.

6. In determining whether or not the defendants did so trespass upon said mining ground you are to determine whether or not the defendants did enter upon a mineral vein or mineral rock in place

where the top or apex is inside of plaintiff's surface lines;
138 and this brings to your consideration what is a vein of quartz or other rock in place.

7. A vein, lode, or ledge is a continuous bed of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, and the term is used in the acts of Congress as applicable to any zone or bed of mineralized rock lying within any well-defined boundaries clearly separating it from the neighboring rock. It is any class of deposits of mineral matter coming from the same source, impressed with the same forms and appearing to have been created by the same process. In general it may be said that a lode or vein is a body mineral or mineral body of rock within defined boundaries in the mass of the mountain.

8. Again, if there is a general and pervading continuance of this mineral matter with a casual and occasional interruption, but pursuing the same general course, bounded by the same rocky material above and below as far as you can trace that until it breaks
139 off totally, and is interrupted for a very long distance, it is a vein of rock or mineral matter.

9. Now, if in applying these definitions to the facts of this case you determine that there is a vein of quartz or mineralized rock in place known as the Salmon lode you are to determine its extent, and, from the developments presented to you, whether or not the defendants entered upon the same and extracted ore therefrom.

10. I further instruct you that metamorphosed lime rock in different forms frequently constitute vein matter in mineral lodes. I also instruct you that often in the same vein of mineralized rock there are chutes of ore or mineralized rock passing from one wall to the other of the same, sometimes in a direct and sometimes in an oblique line, so if you find from the evidence that there is a vein of ore running across what you may find to be a vein of mineralized rock in place known as the Salmon you should not from this fact alone conclude that there is a cross-lode where it is admitted by all that there is a vein or shoot of ore.

140 11. In applying the definition above given you are to consider all of the facts presented to you in this case, what you saw yourself when examining the premises, and what has been testified to before you by the witnesses.

13. The jury in this cause are the exclusive judges of the credibility of the witnesses, and the weight to be given the respective testimony of each, and in determining this question you may take into consideration the manner of testifying, the interest of the witness, the inducements, and all other facts or acts tending to credit or discredit the testimony of such witness.

14. If the jury believe from the testimony that any witness has sworn wilfully false to any material fact in the case, then the jury may discard the entire testimony of such witness.

15. As to the weight to be given to the evidence, this is in your own discretion, but not arbitrarily or capriciously so.

You have been to see the premises about which the con-
141 troversy has arisen, and as nearly all the oral evidence was but attempts to describe those premises, or in other words to bring them into court, so to speak, it is proper that I say to you that the evidence of your senses as to those matters, which the senses comprehend, is the most reliable; and if any witness or witnesses have sworn to a condition of affairs which you have seen is not so, you are not therefore to surrender your knowledge of the absolute fact to the mistake or falsehood of the witness or witnesses.

16. It is essential that the court give you instruction as to what is a "mining claim" as granted by the Government of the United States. It is a grant of rock in place, bearing valuable deposits, and may or may not bear gold, silver, copper, cin-*i*bar, tin, or lead. All that is required is that the deposits shall be "valuable," nor is the word "valuable" to be interpreted as requiring such a value as would make the deposit valuable for present working.

17. The word "vein" or "lode" as used in the statutes of the United States is not limited to bodies of quartz bearing gold,
142 silver, or lead, but means any belt of mineralized rock which lies within boundaries which clearly separate it from the adjacent country. The word "lode" is another form of the word "lead" and meant originally that which leads or directs the miner to look for valuable mineral.

18. A formation within which there were indications justifying the expectation of finding ore, and bounded on two sides by formations which did not justify the expectation of finding ore of value, was the definition of the word lead or lode. The act of Congress was not drawn by geologists with the exactness of scientific definition, but was drawn for the protection of miners in the claims which they had located or were to locate and develop, and are to be interpreted in the light of the object had in view by their passage without the limitation which a scientific definition might impose, which might pervert that object from being fulfilled.

Unquestionably, geologists require a fissure in the earth's crust, made by some force of nature in which mineral is deposited
143 to fulfill their definition of a lode, but to the miner, under the law of the United States, the fissure and its walls are important only as indicating the boundary within which he may look for, and reasonably expect in different places to find, ore.

19. It is necessary for you to find where the Salmon lode extends, if such a lode there be. If you find there is such lode running nearly north and south, your principal inquiry will be to determine how far east it extends. There is no controversy in the proof but that a patent was issued for the Salmon lode, as alleged, and with the description contained in the complaint to the lessors and grantors of the plaintiff, nor is there any controversy but that the plaintiff was in possession of all the surface ground and certain of the excavations during the time of the alleged trespass, which possession, as a matter of law, I say to you is sufficient to entitle the plaintiff to maintain this action, if the place where defendants

entered and took ore is on the Salmon lode, which is the primary inquiry in this case.

144 20. If along the spur which extends from the "Trout Hill" toward Camp creek is a zone of metamorphosed limestone (which means limestone changed by chemical forces since its formation), in which, at different places along its length and in various forms, mineral is found which appears sometimes in a series or succession of ore-bodies, sometimes in apparently isolated chambers, sometimes diagonally or at right angles with the general course of the vein, sometimes in scattered veins, then it is, in the eyes of the law, one lode; and if at the point where the alleged trespass was committed, or opposite where the alleged trespass was committed, the top, apex, or highest part of the vein was within the side lines of plaintiff's patented location, and the lode or mineralized metamorphic limestone widens out and dips easterly to the granite and to where the defendants were at work, and took out the ore mentioned in the testimony, and this point was not easterly of and beyond the granite formation, or was not in and east of the

145 west wall of the granite formation, which is to the east, then, and in that case, the plaintiff was the owner of said ore and should recover therefor. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface, though it might include more than a technical geologist would define as a lode, would be, in the view of the mining laws, fitly described as a lode—in other words, if the plaintiff possessed and owned the Salmon lode, and defendants own or do not own but claim a cross-lode, or if there is a cross-lode at that point, all ore in it which would lie within the lines of plaintiff's vein, as the foot and hanging walls of the Salmon would *would* cut if extended across it, belong to the plaintiff and he is entitled to the possession of the same and damages for any trespass thereon.

21. And as to the words "mineralized rock" the court instructs you that the mineral which it must contain to meet that definition need not be distributed through it universally nor homogeneously, nor need the mineral be gold, silver, lead, copper, iron, or cinnabar, nor need it exist in such quantities that it can now be worked

146 to a profit.

22. If, through considerable portions of the rock of a zone, such as is described, the rock is only mineralized, so as to answer that description geologically, and as to such part could not be made profitable, and if in isolated places there are in irregular slopes and direction ores which are metalliferous within this zone, such ores belong to the person who has entered such zone of ore as a lode and the entry is valid.

23. The plaintiff's ground extends northerly and southerly, and if the top or apex of his lode is within his ground, and his easterly wall is the granite formation, and the defendants took said ore out of the limestone west of the granite it belonged to the plaintiff, for if there is a Scratch Awl lode crossing the Salmon lode, nevertheless, the plaintiff is entitled to all the ore of the Scratch Awl lode within within the walls of his Salmon lode.

24. If a person locates a lode and *and* obtains a patent therefor, supposing that a given formation is one of the walls, and it
147 subsequently is ascertasned that it is not such wall, the party procuring such patent does not for that reason lose his lode, but if the top or apex of it is within his surface boundaries the lode belongs to such patentee.

25. A principal matter of contention in this case—what is the eastern boundary of the Salmon vein, if such there be, at the point opposite or perpendicular nearly to what has been called the Salmon incline; and the court says to you that if there is on the Salmon surface ground at that point the top or apex of a lode running nearly north and south, or if a zone of beds connected with metamorphic limestone mineralized, in which at various points is metalliferous ore, which zone or lode dips easterly toward the granite, and the surface of this mineral belt descends from the top easterly at angle from the horizon into the soil and under it and to the granite, then the granite is the eastern boundary, even if there be as we go east from the apex a succession of layers of various mineralized rock, for their difference in mineral character would not make them less a part of the lode.

148 26. If the limestone found between the granite wall on the east and the shale on the west, which is claimed as the Salmon lode, has by some dynamic force of nature been broken up, crushed, or disintegrated in such manner as to destroy its stratification, except in occasional places; if there is, in the form of manganese or black oxide of iron or silica, other material in such limestone, either in bunches, veins, beds, or interspersed through it, if internal heat has chemically metamorphosed it, it has, so far as its character is concerned, become a proper vein matter, and if interspersed through it there is metalliferous ore, no matter whether continuously or in isolated chambers, no matter whether such ore is a part of a cross-lode or no, if the top of the lode is at the point of the alleged trespass within the patented side lines of the Salmon, then the Salmon lode is a lode and at that point the property of the plaintiff.

27. If there are what in mining nomenclature is called strata of manganese and metamorphic limestone in alternate layers,
149 and the manganese and limestone are mineralized and differ from the country rock, then and in that case they would be no less "vein stuff" or "gangue" because they are of two qualities, for gangue is not required to be homogen-ous.

28. A mineral, in its most enlarged sense, is the substance which once formed or now form- part of the solid body of the earth, either external or internal, and which are now destitute of and incapable of supporting animal or vegetable life.

29. When the Government issues a patent of a lode and surface ground there arises a presumption that there is such lode within the surface ground, and this presumption can only be overturned by a preponderance of the proof showing that the fact is not in accordance with the presumption.

30. The walls, not the ore or "gangue" within it, determine the direction and width of a lode.

31. If the croppings mentioned in the proof as extending north and south are the top or apex of a lode extending in that direction and are within the side lines of the patent offered in evidence, then such lode belongs to the plaintiff, no matter how wide it is, and by the proof of possession, about which there is no controversy, the plaintiff, from August 9 to August 24, inclusive, was in possession thereof.

32. The top or apex of a lode is that part of it along its strike which is nearest the surface if it is a blind lode or one covered by earth or other rock, and is the highest part of the mineralized rock which rises above the surface of the earth along its strike if it crops out above the surface of the earth.

33. The geological distinctions between ore beds and veins do not enter into or affect the rights of parties in defining their rights of discovery and taking possession and obtaining title to mineral deposits under the laws of the United States.

36. No person should be deprived of his right and title to property merely because other parties have spent large sums of money on or near the same; so if you find from the evidence that the defendants have spent upon the Salmon lode or in the neighborhood thereof large sums of money that is no reason of itself why the plaintiff should not recover in this action.

37. Finally, if you find from the evidence that the defendants have trespassed upon the Salmon and Cliff Extension mine, then you are to determine how much the plaintiff has been damaged by such trespass.

38. In determining this question you must learn how much ore the defendants took out of said premises between the 9th day of August, A. D. 1879, and the 25th day of the same month and the value of such ore.

Defendants' Instructions. Given as Requested by Defendants.

In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,

vs.

HUGH T. MURRAY *et al.*, Defendants.

1. It devolves upon the plaintiff in this action to make out his case by a preponderance of the evidence.

7. Plaintiff can only recover for damages, if any, that *has* accrued since the 9th day of August, 1879.

8. The jury are not bound by the opinions of experts or authors of renown, or by any theory that may be advanced by either side on account thereof, but may discard the same when, in their opinion, from the evidence and actual proof with respect to the particular property in question, such theories or opinions are inapplicable or incorrect, and in so considering the testimony of experts and opinions of scientific authors, or authors upon science, you should consider the evidence of witnesses as to actual facts in reference to the

property in question, as well as their own observations from the examination of the property in question.

9. The opinion of experts or authors of scientific works may be discarded by the jury when they consider the same inapplicable to the condition of affairs in question, or inconsistent with the
153 actual condition of affairs in the particular case at bar.

10. Defendants, by the location of a tunnel right, if such are the facts, acquired a right to run through or out the Salmon lode, if there is one, and are not trespassers on that account, and if this constitutes the trespass complained of you will find for defendants.

Modified by the court as follows:

But such easement would not entitle them to the ore coming from the Salmon lode, or ore which comes from so much of a Scratch Awl lode, if such lode you find from the evidence, or lies within the walls of the Salmon lode, if you find from the evidence there is such Salmon lode.

11. The action is for taking away valuable ore belonging to the plaintiffs at the time it was so taken, and he cannot recover in this action for the removal of manganese if the same, according to the evidence, is not ore.

12. The plaintiff in this case can only recover damage for trespasses, if any *was* committed, upon property in actual pos-
154 session of him; so, in considering such damage, as well as whether any trespass was committed, you will first determine what property plaintiff actually possessed, as well as the extent thereof.

14. If you find plaintiff is the owner of only a portion of the property in question and that defendants trespassed upon the same, and you yet find that defendants were and are also owners of a portion of the property claimed by the plaintiff, you will so designate by your verdict.

15. The actual possession of the property upon which the alleged trespass was committed is distinctly put in issue, and if plaintiff has failed to make out his possession to said property he cannot recover, and in any event he cannot recover to any greater extent than he shows such possession.

16. If you find from the evidence that plaintiff is entitled to the strata, vein, or lode designated upon the maps or plats, and as stated in the evidence as the manganese seam bed or vein, and that this is the extent of his lode, vein, or claim, as against defendants,
155 then you will so find and limit his claim if such is its extent only.

17. The same instructions given you in reference to the Salmon lode or vein, if there is any, is applicable to the Cliff lode or mine, if there is any.

Modified by the court as follows: "So far as you have evidence in relation thereto."

18. If plaintiff has failed to establish his boundaries or lines or the boundaries or lines of his claim to enable you to determine the damages he has sustained, if any, he cannot recover.

Modified by the court as follows: "And you will determine from the evidence if there has been any controversy as to such boundaries."

19. The damages, if any, recoverable in this action must be reasonably commensurate with the injury sustained, and it devolves upon the plaintiff to show what it is, and if he fails in this he cannot recover.

Modified by the court as follows: "The damage should not exceed the actual injury sustained by the plaintiff."

156 20. The measure of damages in this case is the value of the ore belonging to the plaintiff as it stood or was in the mine when taken out by defendants, if so taken out, and it devolves upon the plaintiff to show what that damage was.

22. Even if you believe from the evidence that there is a vein or lode of valuable minerals extending in width upon the surface and beneath far beyond the side lines of the plaintiff's claim defined by his patent, he could acquire no right thereto beyond such lines except so far as to pursue the same with the dips, spurs, and angles.

24. The location upon a scope of country alternating between limestone and manganese beds or bodies, and the issuance of a patent for the same, does not, when the apex thereof comes outside of such location or patent, give a title to such lode, beds, or bodies, the apex of which lies outside of the land so located or patented.

157 25. If the evidence shows to your satisfaction that the alleged Salmon lode or Cliff lode is a vein or veins, or lode or lodes, the apex of which is much wider than the claim or patent of the plainiff, then the side lines of his claim or claim so defined by his patent cannot be extended so as to embrace the whole width of such lode or vein, or any more than is actually embraced within such lines.

Modified by the court as follows:

"And as to this it is the apex of the lode, not the whole lode itself, which you are to consider."

27. If plaintiff's patent was based upon a location of a vein running easterly and westerly, and he located his surface ground in a northerly and southerly direction and obtained a patent therefor accordingly, then his side lines becomes his end lines, and vertical planes drawn downward from such side lines will establish his boundaries.

Modified by the court as follows:

"This instruction is applicable in case you find that there is no Salmon lode, and there is an east and west lode."

158 28. Plaintiff is only entitled to recover damages, if at all, for such ore as was removed or extracted from his vein or lode, in case the lode of defendants, if they have one, crosses it at and through the point and place where it crosses the same, and it devolves upon the plaintiff to show the damage thus sustained.

29. If you do not believe that the defendants have removed or extracted any ore from lode or vein of valuable mineral deposits possessed by the plaintiff since he acquired actual possession thereto you will find for the defendants.

31. If the plaintiff is not the owner of, or was not such owner, or entitled to recover damages for ore taken from all the property, and has not shown to your satisfaction what portion he was so entitled to recover, so as that you can get at the amount of such damages with reasonable certainty, he has failed to make out his case and cannot recover.

32. If plaintiff has failed to show what was the value of the ore as it lay and was in the ground owned by him, or for which
159 he was entitled to recover, and which was wrongfully extracted and removed by defendants, he has failed to make out his case and cannot recover.

33. If the plaintiff had no vein or lode of valuable minerals, and was not entitled to the ore taken out by defendants, or any of it, he cannot recover.

34. If the jury believe from the evidence that of the actual facts connected with the particular issues and property in controversy, as well as from their own inspection of said property and the developments thereof, that the evidence of the experts on the part of the plaintiff or the theory or theories of such experts or of authors of scientific works are inapplicable to the case at bar, or at variance with the facts of the case as far as developed, they are, in such respect, entitled to wholly disregard the same if they see proper to do so.

Modified by the court as follows:

"And the same instruction is given you so far as it relates to defendants' experts."

160 35. Defendants rights, if they have any, are not to be frittered away by bare imaginary or speculative theories.

Modified by the court as follows:

"And the same instruction is given you as to the plaintiff's rights, if he has any."

40. If you beleive from the evidence that the plaintiff is the owner of a certain vein or lode, and that the same is an older title than defendants, and that defendants are the owners of a vein or lode which intersects or crosses said lode, then said defendants have a right of way through the same for the convenient working of their claim, and if this constitutes all the trespass complained of the plaintiff cannot recover.

Modified by the court as follows:

"But such right of way conferred no right to the ore therein, and converting such ore by defendants, if done by them, would be a trespass."

41. In case of cross or intersecting veins or lodes the older location or title is not entitled to the ore of such junior inter-
161 secting or cross veins for the full width of his surface claim unless his vein or lode is of such width, but is only entitled to the ore or mineral contained in his vein or lode at the point of intersection or crossing and no further.

Modified by the court as follows:

"The with of a vein or load is the width between its walls."

42. If, therefore, you find the defendants are the owners and possessors of a certain lode or vein of valuable minerals that crosses an older vein or lode of valuable minerals belonging to the plaintiff, it is important that you first ascertain from the evidence the width of said plaintiff's vein or lode, and then ascertain what, if any, is the value of the ore or mineral taken therefrom by the defendants, if any, since the 8th day of August, 1879, and if none has been taken therefrom since said time you will find for the defendants.

43. That the jury cannot surmise any particular fact to
162 exist, and find it to exist on surmise or speculation, but every fact necessary to be established to entitle the plaintiff to recover must be established by evidence of the actual existence of such fact.

44. Before the jury can render a verdict in favor of the plaintiff for damages for ore taken they must find the amount of ore defendants took from the Salmon mine on and after the 9th day of August, 1879.

Modified by the court as follows:

"And also the value thereof; but this instruction is not to be interpreted as requiring proof of the exact value or amount; you should only demand approximate proof if that only, under all the circumstances, is possible or obtainable by plaintiff, and then not permit your verdict to exceed the actual damage sustained."

45. A vein or lode, as used and understood in the acts of Congress and as applicable to this case, is a fissure in the crust or surface of the earth, and containing quartz or other rock in place bear-
163 ing gold, silver, cinnabar, or copper, and other valuable deposits, and that if what the defendants claim as and to be a vein known as the Scratchawl vein contains such requisite it is a vein or lode.

46. A vein or lode being defined as in the foregoing instruction marked No. 45, you are instructed that if at the points and places where the defendants worked and mined and took out ore in August, 1879, there is no such formation running northerly and southerly—that is, if you find from the evidence that at said places there is no fissure or opening containing quartz or other rock bearing gold, silver, cinnabar, or copper, or zone or belt of mineral bearing rock or other valuable deposits lying within clearly-defined boundaries, running in a northerly and southerly direction—you will find that there is no vein or lode so running in such direction at said points and places, and if you do so find you will find for the defendants.

47. That if at the points and places where said defendants worked and mined and took out ore in August, 1879, in what they
164 call the Scratchawl vein, there are separate formations of vein matter running in a northerly and southerly direction, and which said formations, taken together, plaintiff designates as the Salmon mine, and that between said formations of vein matter there are formations of rock known as country rock, and not bearing or containing minerals, running parallel with and lying between said formations of vein matter and clearly separating said forma-

tions of vein matter from each other, then each of such formations of vein matter is a separate and distinct lode or vein and would not constitute one load or vein.

Modified by the court as follows:

"And such vein matter being thus separated by well-defined walls of country rock," after the words each other, in the 23d line.

And which instructions refused are as follows:

Instructions Offered by Defendants and Refused.

2. This is an action of trespass "*quare clausum frigit*," and in order to recover therein the plaintiff must have been in the actual possession of the portion of the property upon which the trespass,
165 if any, is alleged to have been committed at the time of the commission thereof, or have regained said possession thereafter, and entered into the occupation and possession of the same, and continued so as against the defendants up to the commencement of this action.

3. If the defendants were in the actual adverse possession and occupation of the property upon which the trespass, if any, is alleged to have been committed, in good faith, under a claim and color of title, and that the mining and working thereof constitute the trespass complained of at the time the plaintiff went into possession of the same, and continued in such possession up to the commencement of this action, then said plaintiff cannot recover damages in this action on account of the trespass alleged in said complaint by reason of the taking out and conversion of ore from said property.

4. If defendants were, at the time the plaintiff went into possession of the property described in the pleadings, and upon which or a portion of which the alleged trespass, if any, was com-
166 mitted, in the actual occupation and possession of that portion thereof upon which the trespass, if any, was committed, and so continued up to the commencement of this action in good faith, under color and claim of title, then defendants are entitled to recover in this action, and you will find generally for defendants.

5. A party cannot recover in an action of this character against one in the actual adverse possession of that portion of the property upon which the alleged trespass was committed in good faith, under claim and color of title, and who continued so, and was so in possession at the time of the trespass, and so continued up to the time of the commencement of this action, and is now in such possession under such claim.

6. Even if plaintiff was, at the time of the alleged trespass, in possession of the Salmon mine within the limits of the surface lines thereof, yet, if defendants were at the time the plaintiff acquired such possession, in the actual possession and occupation of that portion of the property trespasssed upon in good faith, under
167 claim and color of title, and in the belief that they were the owners thereof, and so continued to the commencement of

this action and at the present time, plaintiff cannot recover, and you will find generally for the defendants.

13. A general verdict for plaintiff, with damages, finds all the issues in his favor to the full extent of his claim, made by the pleadings in this case.

21. The plaintiff by his patent could in no event acquire a title to a vein or lode of valuable minerals, the apex of which came to the surface outside of the end and side lines of his location.

23. If the defendants are the owners of cross-lodes, or a cross-lode cutting through the patented claim of plaintiff, then as to such lode or lodes the side lines at the point of intersection of plaintiff's claim become his end lines, and vertical planes drawn downwards on said side lines will define his boundaries with respect to such cross lode or lodes.

26. If plaintiff's surface claim or claims is or are upon a lode or vein, the apex of which is wider than such surface claim or
168 claims, then, so far as the same continues so wide as such claim or claims beneath the surface, vertical planes drawn downward from the side line of such surface claim or claims will establish his boundaries as to the width thereof.

27. In all cases of cross-veins the side lines become the end lines and vertical planes drawn downward from the point of intersection and the side lines will determine the extent of the claim of the respective owners or claimants in such cases.

30. If you find for plaintiff, but do not find he is entitled to all the property he claims, you will find by your verdict the extent of his claim and define the same.

36. If defendants located the property in controversy and worked, mined, and possessed the same in the usual and customary manner and mode of mining, adversely to the plaintiff and his predecessors in interest, for the full space of two years next preceding the commencement of this action under claim of title, you will find for the defendants.

37. It is admitted in the replication to the separate answer
169 of Murray and Durfee that they made some kind of a location of the property claimed by them, and recorded the same in the records of quartz lodes in Deer Lodge county, Montana Territory, in the year *A. D.* 1875, and if you find or believe, in pursuance of such location and record, and under a claim of title, they entered into possession of the property in controversy, and sunk from the surface down into and upon the same a shaft and winze, and since the year *A. D.* 1875 have continuously mined and possessed the same adversely to said plaintiff and his predecessors in interest under claim of title, and that the said possession and mining constitutes the trespass complained of, and that it so continued up to the commencement of this action, then by the statute of limitations they acquired a title to said property, and no notice in the meantime by plaintiff or his predecessors in interest of their claims or title thereto could defeat the title thus acquired.

38. Actual adverse possession of the property in controversy under a location thereof, made on the surface above the same by plainly

marking out its boundaries and recording the same and
170 the sinking of a perpendicular shaft and winze from the surface, and mining and working the same in the usual way by defendants for the space of two years consecutively before the commencement of this action, under a claim of title thereto, bars the title of plaintiff and his predecessors in interest, and vests a perfect title thereto in said defendants as against said plaintiff, and if you find such to be the fact from the evidence it establishes said defendants' title, and no notice of plaintiff or his predecessors in interest of their claim in the meantime will defeat the same.

39. The adverse possession defined by the last instruction for two full years, by defendants, before the commencement of this suit by plaintiff, if such is the case, entirely defeats his rights of discovery, and you will find for defendants.

48. That though plaintiff was in the actual possession of the Salmon mine at its surface on the 9th day of August, 1879, and although said Salmon mine may extend down and beyond the side lines of said Salmon mine, such surface possession would not
171 extend to any portion thereof actually occupied and possessed by the defendants, and although the plaintiff may have had such surface possession, if the jury find that the defendants have for a long time prior to the date of the alleged trespass and at such date actually worked and mined such portion of said Salmon mine outside of the plaintiff's surface lines, and that the plaintiff has never occupied or worked outside thereof, or where the defendants have been so working, and the said defendants worked under claim of title, then the jury will find for the defendants.

49. If the jury believe from the evidence that the defendants were, at the time of the alleged trespass, had been for a long time prior thereto, and were, at the time of the commencement of this suit, in the actual possession of a certain vein or strata of quartz or ore crossing or intersecting the vein or lode of the plaintiff, if he has any, under a claim or color of title, and a claim that the same was a cross-lode or a lode intersecting said plaintiff's lode, then the burden of proof rests upon plaintiff to show that it was not
172 such cross or intersecting lode.

50. And if the state of facts above given do really exist, then it is admitted in the replication and averred by the plaintiff therein that it is not sufficiently developed to demonstrate that it is a cross vein or lode, and you will therefore find that there is such.

51. Plaintiff must recover, if at all, upon his own title; and if defendants were in the actual occupation and possession of a certain vein or strata of ore, claiming the same as a cross or intersecting vein, then the pleadings of the plaintiff declare the fact that it is not sufficiently developed to demonstrate the fact whether it is such cross-vein; and if the work thereon constitutes the trespass complained of, you will find for the defendants.

53. In explanation of the 4th instruction given on the part of the plaintiff, the court instructs you that the action involves the question of damages to the freehold, and cannot, in so far as such damage is concerned, be maintained by a tenant.

173 54. During the time plaintiff was a tenant of Holland and Estell, if he was such, he did not hold the legal title to the property, and if you find that defendants during such time were in the actual adverse possession of the part of the property upon which the trespass was committed, if committed at all, under a claim and color of title, and was so in the possession at the time said plaintiff became such tenant, then he cannot recover damages during said time, if you find defendants continued to hold and did hold said possession at the time of the commencement of this action.

For evidence given on said trial and as necessary to explain the various exceptions of the defendants in the statement and specifications of errors herein defendants append and state herein all that subjoined as the testimony given at said trial and which is as follows:

174 In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,

vs.

HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, and HENRY SCHNEPEL, Defendants.

The following is the evidence given upon the trial of said cause as far as it is material to explain the errors complained of. The plaintiff offered in evidence the following papers:

United States patent granted to James W. Estell and Eli B. Holland to certain quartz mining property called the Salmon and Cliff Extension lode, lot 38, township 7 N., of range 7 west, which was admitted.

Deed from said Estell and Holland of said lode to the plaintiff, which was admitted.

Said patent and said deed are severally in the words and figures which follow, to wit:

175 General Land Office No. 234. Mineral Certificate No. 104.

The United States of America to all to whom the presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field notes of survey of the claim of Eli D. Holland and James W. Estell upon the Salmon and Cliff Extension, 2 lodes, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that in pursuance of the said Revised Statutes of the United States Eli D. Holland and James W. Estell did, on the twenty-fourth day of April, A. D. 1875, enter and pay for said mining claim or premises, being mineral entry No. 104 in the series of said office designated by the surveyor general as lot No. 38, embracing a portion of township seven (7) north, of range

thirteen (13) west, of the — principal meridian, in the Flint
176 Creek mining district, in the county of Deer Lodge and Territory of Montana, in the district of lands subject to sale at Helena, containing three (3) acres and twenty-five hundredths ($\frac{25}{100}$) of an acre of land, more or less, and according to the returns on file in the General Land Office, bounded, described, and platted as follows, with magnetic variation at twenty (20) degrees thirty (30) minutes east, to wit: Beginning at corner No. 1, a limestone 13 x 12 x 14 inches in size, situate on the southwesterly boundary of the claim from which the initial point for surveys in the locality situate on Trout Hill and on the northerly boundary of survey No. 37, patented to Edwin H. Irvine *et al.* with their claim upon the Gem lode, bears south thirty-nine (39) degrees thirty (30) minutes west at the distance of nine hundred and forty-three (943) feet; the centre of a shaft on this claim bears north fifty-five (55) degrees east at the distance of ten (10) feet, a fir fourteen (14) inches in diameter bears south seven (7) degrees east at the distance of twenty-eight (28) feet, and a fir nine (9) inches in diameter bears south seventy (70)
177 degrees west of the distance of twenty (20) feet; thence from said corner No. 1 north thirty-five (35) degrees west two hundred and eighty-three (283) feet to a point from which a shaft bears north fifty-five (55) degrees east at the distance of twenty (20) feet, six hundred (600) feet to corner No. 2, a limestone 20 x 12 x 8 inches in size, from which a fir nine (9) inches in diameter bears south forty-three (43) degrees west at the distance of forty-one (41) feet and a fir seven (7) inches in diameter bears north eight (8) degrees east at the distance of forty-eight (48) feet; thence from said corner No. 2 north fifty-five (55) degrees east one hundred and eighteen (118) feet to corner No. 3, a limestone 16 x 12 x 10 inches in size, from which a fir nine (9) inches in diameter bears north eleven (11) degrees east at the distance of forty-two (42) feet, and a fir seventeen (17) inches in diameter bears south eighty-seven (87) degrees east at the distance of twenty-four (24) feet; thence from said corner No. 3 south thirty-five (35) degrees east six hundred (600) feet to
178 corner No. 4, a limestone 14 x 12 x 5 inches in size, situate at centre of northerly boundary of the claims, from which corner No. 1, hereinbefore described, bears south fifty-five (55) degrees east at the distance of one hundred and eighteen (118) feet, a fir fourteen (14) inches in diameter bears west at the distance of eleven (11) links, and a fir eleven (11) inches in diameter bears south forty-three (43) degrees thirty (30) minutes west at the distance of nineteen (19) links, twelve hundred (1,200) feet to corner No. 5, granite stone 18 x 14 x 6 inches in size, from which a fir seventeen (17) inches in diameter bears south seventy-one (71) degrees thirty (30) minutes west at the distance of six (6) feet, and a fir ten (10) inches in diameter bears north seven (7) degrees east at the distance of forty-seven (47) feet; thence from said corner No. 5 south fifty-five (55) degrees west one hundred and eighteen (118) feet to corner No. six (6), a granite stone 30 x 20 x 7 inches in size, from which a fir eleven (11) inches in diameter bears north twenty-six (26) degrees

west at the distance of six (6) feet, and a fir twelve (12)
179 inches in diameter bears south eighty-eight (88) degrees west at the distance of thirty-four (34) feet; thence from said corner No. 6 north thirty-five (35) degrees west two hundred and twenty (220) — to top of hill two hundred and eighty-seven (287) feet to a point on the southerly boundary of the survey made for the Providenta lode, from which the entrance to a tunnel bears south seventy-eight (78) degrees west at the distance of one hundred (100) feet, six hundred (600) feet to the place of beginning, containing three (3) acres and twenty-five hundreths ($\frac{25}{100}$) of an acre of land, more or less, and embracing twelve hundred (1,200) linear feet of said Salmon and Cliff Extension, No. 2 lodes, to wit, discovery claim and claim No. one (1) northwesterly, and claim No. 1 southeasterly from said discovery claim on the Salmon lode, and discovery claim and claims Nos. one (1) and two (2) southeasterly from said discovery claim on the Cliff Extension, No. 2 lode, as represented by yellow shading on the following plat.

180 Map and plat.

(Here follows diagram marked p. 181.)

182 Now, know ye, that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Eli D. Holland and James W. Estell, and to their heirs and assigns, the said mining premises hereinbefore described as lot No. 38, embracing a portion of township seven (7) north, of range thirteen (13) west, of the — principal meridian, with the exclusive right of possession and enjoyment of all the lands included within the exterior lines of said survey not herein expressly excepted from these presents, and of twelve hundred (1,200) linear feet of the said Salmon & Cliff Extension No. 2 veins, lodes, ledges, or deposits for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended
183 downward vertically, although such veins, lod-s, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits: And provided further, That nothing in this conveyance shall authorize the grantees therein, their heirs and assigns, to enter upon the surface of a mining claim owned or possessed by another.

To have and to hold said mining premises, together with all rights, privileges, immunities, and appurtenances of whatsoever

nature thereunto belonging unto the said Eli D. Holland and James W. Estell, and to their heirs and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land
184 hereinbefore described as lot No. 38, with twelve hundred (1,200) linear feet of the Salmon and Cliff Extension No. 2 veins, lodes, ledges, or deposits for the length aforesaid throughout their entire depths as aforesaid, together with all the other veins, lodes, ledges, or deposits throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior or lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be
185 recognized and acknowledged by the local laws, customs, and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress the Legislature of Montana may provide rules for working the mining claim or premises hereby granted involving easements, drainage, and other necessary means to its complete development.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be thereunto affixed.

Given under my hand, at the city of Washington, the eleventh day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

By the President.

[SEAL.]

R. B. HAYES.
By B. L. LANG, *Secretary.*

Recorded [in] vol. 27, pages 467 to 473, inclusive.
(Examined.)

S. W. CLARK,
Recorder of the General Land Office.

186 This indenture, made this fourteenth day of March, A. D. 1879, by and between Eli D. Holland, James W. Estell, and Mary C. Estell, wife of the said James W. Estell, of Deer Lodge county, Montana Territory, of the first part, and James K. Pardee, of the same county and Territory, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of

nature thereunto belonging unto the said Eli D. Holland and James W. Estell, and to their heirs and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land
184 hereinbefore described as lot No. 38, with twelve hundred (1,200) linear feet of the Salmon and Cliff Extension No. 2 veins, lodes, ledges, or deposits for the length aforesaid throughout their entire depths as aforesaid, together with all the other veins, lodes, ledges, or deposits throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior or lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be
185 recognized and acknowledged by the local laws, customs, and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress the Legislature of Montana may provide rules for working the mining claim or premises hereby granted involving easements, drainage, and other necessary means to its complete development.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be thereunto affixed.

Given under my hand, at the city of Washington, the eleventh day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

By the President.

[SEAL.] R. B. HAYES.
By B. L. LANG, *Secretary.*

Recorded [in] vol. 27, pages 467 to 473, inclusive.
(Examined.)

S. W. CLARK,
Recorder of the General Land Office.

186 This indenture, made this fourteenth day of March, A. D. 1879, by and between Eli D. Holland, James W. Estell, and Mary C. Estell, wife of the said James W. Estell, of Deer Lodge county, Montana Territory, of the first part, and James K. Pardee, of the same county and Territory, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of

the sum of twenty-five thousand dollars to them in hand paid, do hereby grant, bargain, sell, convey, and confirm unto the said party of the second part all and singular the following-described property, situated and being in the county of Deer Lodge and Territory of Montana, to wit: All that certain lot, tract, piece, or parcel of mineral land situated in Flint Creek mining district, county and Territory aforesaid, known as the Salmon and Cliff Extension No. 2 lode and designated by official survey as lot number (38) thirty-eight, embracing a portion of township No. seven (7) north, of range thirteen west, of the — principal meridian, containing three acres and twenty-five hundredths ($\frac{25}{100}$) of an acre, for a more particular
187 description of which reference is hereby made to mineral certificate No. 104; together with all and singular the improvements thereon and the rights, privileges, and appurtenances of every kind and description thereunto belonging or in any wise appertaining or therewith usually had and enjoyed; to have and to hold all of said property and premises, with the improvements, rights, privileges, and appurtenances thereof, unto the said party of the second part, his heirs, representatives, and assigns, forever; and for said parties of the first part hereby covenant, promise, and agree that they will warrant and defend the title to the above-described property unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

MARY C. ESTELL. [SEAL.]
ELI D. HOLLAND. [SEAL.]
JAMES W. ESTELL. [SEAL.]

188 TERRITORY OF MONTANA, }
County of Deer Lodge, } *ss:*

On this 14th day of March, A. D. 1879, before me, a justice of the peace in and for said county, personally appeared Eli D. Holland and James W. Estell, both personally known to me to be the persons described in and who executed the foregoing conveyance, and who each for himself acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

And at the same time came Mary C. Estell, wife of the said James W. Estell, personally known to me to be the person who executed the foregoing conveyance, and who being by me examined separate and without the hearing of her said husband acknowledged that she executed the same freely and voluntarily without fear or compulsion of her said husband, and that she did not wish to retract the same.

In testimony whereof I have hereunto set my hand this day and the year last aforesaid.

J. A. QUINN,
Justice of the Peace.

189 George B. Foote was introduced, sworn, & examined on the part of the plaintiffs and testified as follows, to wit:

"I live in Helena, Montana Territory; I am a civil engineer and United States mineral surveyor. I know the parties in this action and the ground described in the patent read; I have seen it 15 or 20 times; I have examined a vein known as the Salmon within the 3.25 acres of ground described in said patent; I examined it last on the 9th and 11th day- of December, A. D. 1879; I surveyed it; I was in the Sharktown tunnel and surveyed it. I was in the Murray & Durfee shaft on Scratch Awl vein. I have examined Trout Hill and surveyed all over it. The Salmon and Cliff Extension are on a hog's back running from the Trout Hill on the same range extending from "Trout Hill" towards "Camp Hill" and "Tower." On the surface there is every visible evidence of a contact vein. Between the clearly-defined granite and limestone there is a width extending as high as 120 feet; in some places it is narrower; the minimum is about 60 or 70 feet as far as my survey went.

190 Outside of my survey it is as low as 7 or 8 feet. At the Salmon incline the apex of the lode is nearly in the center of the surface ground.

With what is the vein there filled?

The vein is there filled with manganese, inorganic limestone ore, silver ore, tall vein matter. I have made a map of the hill. It conforms to my measurement made on the ground. I made the surveys and map myself. Captain W. W. DeLacy was with me, but did not make the map. There is only one line on the map made by Mr. Pardee's suggestion. It is the blue line to show the position of the granite at one point where I did not see it. I know nothing as to the correctness of the map on that point. Everything else is from my own measurements; there are three maps, A, B, and C.

On the top of the hog's back are croppings of quartz and ore-bearing rocks extending on the line of the Salmon and Cliff Extension for 400 or 420 feet, and stand out of the ground 6 or 8 feet. The apex of the croppings extends on the Salmon and Cliff Extension surface for 60 or 80 feet, and pass from the Cliff Extension

191 70 or 80 feet north of the Salmon discovery shaft. The Salmon discovery shaft is 75 feet north from the Durfee shaft on the Salmon mine. The salmon ground is oblique to the course of the croppings of the vein. The angle of the dip of the Salmon is, by the workings, nearly 45 degrees. The walls are as regular as ordinary in veins. I examined the dip at the incline; the incline has more inclination than the vein; the workings on the Salmon lode are discovery shaft; the incline, the air shaft and the winze. Murray & Durfee shaft is 6 or 8 feet from the Salmon line. To reach the Salmon foot wall the incline would have to go 110 or 120 feet. From the Salmon incline to the Murray and Durfee shaft the ground descends about 18 feet. If there is any ore there it is covered up, and does not come to the surface. I measured down the air shaft 20 feet; here the granite is clearly defined; could not see

further on account of the lagging. From the top of the Salmon incline to the top of the first Murray and Durfee level is 78 feet; to the second, 123 feet; to the third, 143 feet; and to the tunnel it is 190 feet.

192 The Sharktown tunnel runs diagonally through the vein. It commences in the granite hanging wall. It leaves the granite 67 feet from the mouth and comes into vein matter. It enters the foot wall of the vein 418 feet from the mouth. If the vein continues dipping as in the incline the parties at the turn-table are 60 feet from the vein. On a dip of 45 degrees a depth of 190 feet would throw the vein 190 feet east of the surface at the incline. Within the vertical boundaries of the Salmon surface ground about 40 feet of the tunnel is in the Salmon lines. I have examined the ground from Frost creek to the first gulch north of Tower gulch. I am informed of the geological formation of that country. I know enough of mineral geology to tell the materials of veins. I have studied geology practically in my business. The change from vein matter to country rock is gradual, more so on the granite side. The lime is more impregnated into the vein than is the granite. The rock between the lime and the granite over the tunnel along

193 the westerly half or two-thirds of the Salmon mine consists of some quartz, silica, limestone, manganese, lime and manganise. It is vein matter. There is also metamorphic lime impregnated with manganise. On the walls there is generally talc. Country rock sometimes gets into veins in horses, but is still called vein matter, because it is within the vein. The Salmon incline was in vein matter to the 54-feet level. The incline changes its course a little when it meets the foot wall. The foot wall is there clearly defined. The 72-feet cross-cut from the incline to the Murray and Durfee shaft runs through clear vein matter. From this cross-cut to the bottom the incline generally has vein matter on the east side and on the west side clearly-defined limestone. The cross-cut from the tunnel was through manganese. At 127 feet into the tunnel the timber ceases. Here manganese crosses the tunnel. At 139 feet is a cross-cut to the left; at 150 feet is a bunch of manganese and natural opening overhead; at 175 feet a soft streak and two sets of timbers; at 200 feet manganese to the left; at 218 feet there is a streak

194 of ore; at 264 feet ore ceases; at 309 feet is manganese on both sides—heavy bodies; at 362 feet manganise ceases; at 418 feet is a vein of talc, which I decided to be the foot wall of the Salmon. From this point the tunnel is wet. To the end of the tunnel it is 598 feet. From the centre of the turn-table I ran east on a drift $27\frac{3}{10}$ feet, where the tunnel bends north. 2nd course was at 76° E. 40 feet to an ore chute; 15 feet back of this is strong green talc casing, dipping east 45°. This casing is on the line of the 3rd course, S. 84° 45′ E. $22\frac{1}{2}$ feet to a winze. From the chute to the end of the drift is manganise *from the chute to the end of the drift is manganise.* 4th course, S. 76° E. 28 feet to a drift running north $7\frac{1}{2}$ feet. This drift is in vein matter, with the ore running about north. From the turn-table to the end of the tunnel level is 160 feet. The end was filled in. I took out the filling and found granite and gra-

nitic rock mixed with talc casing. The granite presented a face towards the west. From where we struck the limestone to
195 where the water ceased was a continuous mass of manganese and sandstone and metamorphic lime, dipping east. The Salmon vein was perfectly dry. I first found water at 418 feet from the mouth of the tunnel. The source of this water is outside of the vein. Where the Salmon incline enters the foot wall there was very little water.

At how many places can you approach the hanging wall?

On the 120-foot level, at the end, is a heavy body of manganese; 103 feet from the shaft was a small vein of quartz; this is the last indication of quartz. I then found talc, sand granite and talc at three points—1st, at the end of the tunnel level; 2nd, at the end of the 120-feet level; 3rd, in the air shaft. On the Salmon incline at 54 feet is a level north and south. On the north level there is copper-stained ore; the length of that level is 23½ feet. The ore there dips at 45°. At the end of the 23½ feet is an excavation running 4 feet further. A cross-cut then runs east 8 feet, seams dipping east from 45° to 70°. From center of incline I ran south; then easterly 16½ feet to the face. This opening shows vein
196 matter, and seams dipping easterly 45° to 70°. The dip of the incline to the 54-feet level is 67°; from the 54-feet level to the bottom it is 65½°. At the 72-feet cross-cut is a well-defined streak of quartz. At 30 feet along that level there is a cut to the north of 13 feet, also a cut N. E. 25 feet, and then east 12½ feet. Four feet from the face of that cut is a well-defined streak of quartz running east. Several streaks show the vein dipping east 45°. From the 72-feet level I ran down at an angle of 67°; thence at 50° 20 feet to a notch in the ladder. The cross-cut at the bottom of the incline is 6 feet wide and runs to the Murray and Durfee shaft. I have examined the ore and vein matter of the Salmon at various places and also on the Estell. On the Estell, at the discovery, is a body of croppings for a long distance of the same; same character as the Salmon cropping; the strike is the same general course. The ore from the Salmon incline and from the Estell are similar. Where the Algonquin crosses the contact the lime and the granite are well defined. East of the Salmon and Cliff Extension the soil,
197 boulders, and everything else indicates granite. To the west of that everything indicates lime. A stream crosses the southwest corner of the Estell in a ravine between the Salmon and Estell lodes. I examined the discovery hole on the Salmon. I found no ore there I would like to mill. The discovery hole is in the croppings of the Salmon. I made all the measurements and surveys for that map, and it is correct in every particular in reference to those mines. The blue line in the map "C" is not mine, and I don't know where the granite is at that point. I found granite in the air shaft. The timber is tight, and I could get it out only at the corners. I saw no lime indications here. I picked into the openings; vein matter is anything between two well-defined walls; anything in a zone between two formations of the mine or different matter. The width of the Estell mine between the granite and lime

is 97 feet. I made the lines on the map to indicate the points up to which the granite is well defined on the ore side and the lime on the other.

Between the two is vein matter; I can't say of what it is
198 composed. At the discovery on the Estell the vein matter is 97 feet wide. The vein was not cut from wall rock to wall rock. I judged by the croppings; I can tell the width in this manner of the Estell at the discovery. The croppings in some cases overlap the wall rock, but not in all cases. Ninety-seven feet [is] the width as nearly as I would judge from the croppings and cuts. There is a cut on the westerly side; the croppings are bold, prominent, and solid; between the granite and lime, I am positive, is solid vein matter. If quartz and rock are mixed between two walls I call it all vein matter, even if it were a mile wide, and $\frac{1}{20}$ were lime, &c. From the bottom of the Murray and Durfee shaft to the turn-table is, vertically, 42 feet. If the Salmon vein dips at 45° a line projected from the incline on its direction would strike the tunnel level at 190 feet, 20 feet east of the winze. No change has been made on this map since I came to town, except to move the yellow lines on map "C" 15 feet to the left. I discovered this error from my notes; this
was not done by Pardee's direction. When I made the survey
199 Pardee necessarily told me what points he wished noted, but did not tell me to put "granite" or "lime" at any particular points. There were present at the survey Showers, Pardee, Murray, and Durfee, and Philips; also Captain De Lacey. De Lacy and I went, & each made some notes, and we compared them. I generally ran the instrument and De Lacy made the notes. The notes from which I have been testifying were made by us jointly, and compared.

"Did not Captain De Lacy say he would not make any notes except as directed by Mr. Pardee?"

"Did not De Lacy ask Pardee what notes he should make as to the formation of the rocks?"

We asked Mr. Pardee what notes and points he wished noted in case any escaped us. Mr. Pardee called our attention to some points; he would say "Note this manganise, &c.;" he did not say "Note that; this is manganese, &c." His directions were only general. From where the tunnel passes from the granite to the limestone it is vein matter. In the tunnel at the granite there was not a well-defined streak of manganise; there is one at the first cross-cut in the tunnel.

Manganise is a mineral, which occurs in different forms, ox-
200 ides, &c. What we there called manganise is a black oxide. I have never assayed any manganise which contains silver. It is a black and brownish, and different color from other formations. I cannot remember any open place in the tunnel where the granite and manganise were met. I could tell where the granite ended within 2 or 3 feet after leaving the granite. I can't say into what we pass from there. There is manganise in the first cross-cut in the tunnel, perhaps 20 feet of it. Between the timber and the next manganise is a silicita of lime—manganise and stained vein matter. There are perhaps 1,000 streaks of manganise in the tunnel I think I can swear there are 500 streaks from $\frac{1}{100}$ of an inch to 20 feet. Manganise lime-

stone is limestone impregnated with manganise. There is a great deal of silicate of lime in the tunnel—*i. e.*, lime impregnated with silica. Between the manganise is what is commonly called lime. Before the tunnel reached the turn-table the rock is rather a blue limestone; beyond the yellow lime (on map "A") the lime has more silica; before it, more manganise. I am not an expert
201 chemist, but think I could analyze a rock by reference to my books; I have studied chemistry. The formations on the different sides of the yellow line (map "A," 418 feet in the tunnel) are entirely different. I can distinguish them: I call the yellow line the foot wall of the Salmon, because it is the first indication of a well-defined foot wall. When lime is a wall it is natural for it to infiltrate the vein. From the turn-table to what I call the foot wall of the Salmon, there is no good ore; I examined carefully and found none in the roof of the tunnel level. On the tunnel level beyond the foot wall of the Salmon I found ore. There is a streak of ore in the tunnel level ending at the end of the level. It is overhead, is perpendicular, and is from 2 to 4 feet wide. I found ore in the 120-foot level, 27 feet from the shaft. I found ore overhead in the 100-foot level. I found vein matter on the side of the 120-foot level, but not on the side of the 100-foot level. Much of the 60-foot level is stoped out. I have indicated granite on the map "C" as it is, because I found it in the air shaft and in the end of the tunnel level, and found the same talc ore matter in each place. In the end of the
202 tunnel level there was granite rock in an irregular hole, mixed with talc ore matter. It was not over the end of the tunnel level. It was in bodies—in nodules. It was tight up in the hole running up in chunks. There was here no indication of ore or vein matter except this talc ore. In my opinion this level had reached the granite. In the 120-foot level I found this talc, which adjoins the granite. I never knew this talc ore except it was adjoining granite. The 120-foot level was filled in with manganise, and I found no granite there. In none of the levels was the vein matter running east and west at a single point unless it was covered with timber. There was no formation of the rock which blended with the metamorphic limestone, so far as I could discover. The stratification all runs northerly.

"Does the formation overhead show an ore streak running east and west?"

Yes, sir; the ore streak runs east and west. It is a seam streak or body. A vein is a fissure in which ore occurs. There may
203 be places where veins cut across beds. I never saw a silver quartz bed; I have heard of them; beds have no walls. The formation between the lime and the granite is not a bed; it is a contact ven. Whatever it is, this streak cut across it. Do not know what was below the granite in the air shaft. At the Salmon incline the croppings go from 20 to 25 feet down the hill. I did not pass out of the manganise on the 72-foot level.

"If the Scratch Awl runs as the defendants claim it does, would not the manganise be more widely extended at the point of the crossing of the Salmon and Scratch Awl?"

When two veins cross each other at the point of crossing it is very much enriched and sometimes widened. One vein is very much enriched. Even a mineral vein crossing a barren one the barren vein in some cases becomes mineralized. If there was rich ore at the turn-table I should think it a little seam or spur from the main vein. If this went all the way through the limestone it would not be evidence of a crossing vein. If it ran into the country rock beyond its continuance it would be a vein. A cross-vein is possible and sometimes occurs. From the surface to the 54-foot
204 level it is possible for the Salmon to spread from 18 to 120 feet. The surface ground of the Salmon [and] the Cliff Extension does not run in the same direction as the lode. The lode runs by the line of the croppings. I cannot say whether the Salmon and Cliff Extension are as wide as represented on the map. It is covered with surface matter. I don't know how wide the vein is at the Salmon and Cliff Extension. I am not Pardee's attorney. I have not said that I am retained. I was employed by Mr. Pardee. I have no bargain for anything more than witness fees. He was to pay me for the surveys; I have no bargain for anything else. There is water beyond the yellow line on the map "B." Water is found in both the lime and the granite. The water is more apt to be found at points beyond the foot wall. Water is as liable to be found in a vein as in country rock, but the water here shows a line of demarkation. In the Salmon incline I found no ore. I first found ore in the 54-foot level, 6 or 7 feet in. I found more on the walls of the incline. I found ore at the bottom of the incline, a little
205 to one side. I found sandstone all through the Salmon vein; it is a silicate of lime—a metamorphic lime. I found no other sort of sandstone. I have heard T. H. Kleinschmidt call this sandstone; it differs from quartz sand. Some sandstone hardens by exposure; some disintegrates. Limestone is affected in the same way. What I called sandstone is metamorphic lime. Some of the lime there is laminated; some is in boulders, which being broken is sugary. Quartz itself has no cleavage. Crystal-ized quartz has cleavage; is on the lines of crystal-ization. The rock beyond the 418-foot point in the tunnel has a cleavage; before that point it has none; it is laminated. The manganese before the 418-foot point is generally parallel; its general course is about 15° to the tunnel. The strike of the manganese seams is the same as the country rock of the Salmon vein. I cannot tell how far from the mouth of the tunnel the Salmon lead is. If the Salmon dips regularly from the mouth of the tunnel to the Salmon foot wall, at an angle of 45°, it would be 110 feet. The tunnel level ends in a bed of manganese. On the tunnel level the manganese lies in large bodies and
206 bunches. I don't know whether the manganese in the tunnel next the granite extends across the tunnel. At the end of the tunnel level the granite can be picked. These specimens came from that place; they are talc ore and granite. Limestone usually overlies the granite. Geological upheavals sometimes turn them over. I expect the granite to turn over on the way down. The granite here has not the appearance of being washed down.

The granite at the end of the tunnel level is metamorphosed. I think that granite was not washed there. My opinion is that this granite, when molten, [was] crowded down by the weight of the hill. I examined the discovery shaft on the Salmon. I did not see any ore there, and could not tell the dip of the vein. I do not know what this specimen is; the other is granite rock. They both came from the end of the tunnel level.

"Is the point of contact for the entire length exposed by the excavations?"

No.

"If not exposed, how did you draw the blue and yellow lines on your map?" (Indicating granite and lime.) From this basis,
207 if it is exposed at one point and another, it must be continued in the intermediate places.

James W. Estell was then sworn and examined, and testified on the part of the plaintiff:

I reside in the Deer Lodge Valley. I am familiar with the Salmon and Cliff Extension lodes. I resided there from 1866 to seven months ago. I was a miner while there. I have been mining since 1863. I became acquainted with the Salmon mine in 1866. My mother and I discovered it. I located it August 4 or 6, 1866. Holland and I owned it until 1879. We made the discovery hole about 75 feet below the incline. In 1866 discovery hole was dug 6 or 7 feet deep. In 1867 it was sunk to its present depth. I cannot say how many tons of ore we took out. We never worked any together on the discovery hole. In 1878 we went down 40 feet, at the present incline. We took no valuable ore from the discovery hole. We took out some galena. In 1870 Holland and I worked on the division line between the Cliff Extension and the
208 Salmon. We had some ore worked from here; this was just above where the work now is; we sold this ore to the Northwest Company; we took out from here about 130 tons; the mill return from the first lot was 68 ounces; from the second, 65 ounces. In the second lot there was some ore from the incline; from the incline we melted about five tons. We did no other work on the mine except cutting a road. I traced the vein by the cropping. In the discovery hole the vein was north and south; at the incline we aimed to go under the hard quartz; this was in 1868; the vein dipped east, and strikes northerly and southerly; we started a shaft at the intersection of the Salmon and Cliff Extension. These various excavations were on the same vein, judging from the line of the croppings. I have noticed granite on the east and lime on the west. The possession of this property passed to Mr. Pardee nine or ten months ago. It was when we executed the deed and put it in escrow. That is the deed—14th of March, 1878.

What was the quality of the ore at the various places along the line of the vein?

209 At the upper line the ore was more uniform. At the incline we had more sorting. There was more manganese and

galena. It ran about 72 ounces at the line of the Salmon and Cliff Extension.

Mr. Pardee excavated ore at the line of the Salmon and the Cliff Extension and commenced the incline. I was in the works only once since I left the camp. The incline was then below where we left it.

The Murray and Durfee works and the incline had been connected. I cannot say positively that the Murray and Durfee works were on Pardee's vein. The Murray and Durfee shaft and connections seemed to be in vein matter. I am one of the grantees in the patent. We had a survey made for the patent, October 7, A. D. 1872. The dip of the vein was about 45° east. I went into the 54-foot level. It is in vein matter. In the north drift there was some ore. I cannot say which way the strata of that ore runs. It dipped east and laid pretty flat.

Cross-examination:

I can't say when the deed was delivered to Pardee. It was placed in escrow. The sale has been completed. No part of the pur-
210 chase-money depends upon the event of this suit.

"Would the success of this suit affect you if Pardee were unable to pay you, if this suit goes against him?"

I don't know.

"Has he paid you all of the purchase-money?"

He does not owe me anything. I hold a mortgage against the mine as a security for a note. The mortgage is on the Salmon and Cliff Extension. I have other securities besides the mine. The shaft, fifteen feet west of the incline, is four or five or six feet square. We meant to sink that shaft on the Salmon foot-wall, and partly in it. It was perpendicular and then inclined. We found coating of the vein all the way. On the incline we ran through clay-line and a mixture. On the Pardee incline we had quartz all the way down; paying quartz. In the perpendicular shaft we had quartz where we started in in 1868. When Holland and I started the incline in 1878 Murray and Durfee had commenced the shaft below us. We were partially induced to commence the incline by reason of Murray and Durfee having struck rich ore in their shaft. Their dis-
211 covery was not the principal reason.

"Why did you delay from 1868 to 1878 before continuing your work?"

Holland and I were unable to do much work until we consolidated. We got out 70 tons and could not get it worked, and could not afford to go on.

"Did you see croppings of a cross-vein?"

I saw no croppings of a lead-crossing there, nor of one running east and west. The heavier body of Salmon croppings is east of the incline 10 or 15 feet. The ore in the incline is better than in the discovery hole. The assays of ore from the Salmon discovery warranted development, but we did not develop any more. We worked in the district sometimes for wages — for grub. On the incline we did not go through the vein. We ran east from the incline 3 or 4

feet; we took out vein matter the whole width of the incline. I think Schnepel was there when I was sinking the Pardee incline, but do not remember any conversation with him; we were talking some and he may have spoken to me of the ore in incline.

212 The ore there does not run east and west bearing.

"Did not Schnepel speak to you of the ore in the incline?"

The ore we took out of the incline did not run east and west.

Here an affidavit was shown witness.

I signed that affidavit; we found shoots of ore east and west, as testified to in that affidavit. There is a shoot which has an easterly bearing in the shaft; there were shoots running across the Salmon vein in the Salmon incline. I don't know that seeing the croppings was an indication to us to sink. We had quartz in the manganese body in little strata and spots and bunches. I do not know that this streak shows in the bottom of the incline. The bunches were broken and were not running east and west. One stratum seemed to me to run east and west. In the incline it went north, and I never found it *vend* back. The ore from the incline and from the Murray and Durfee works were pretty much the same. The ore from the discovery hole might prove entirely different if analyzed. It did not look different to a

213 miner. The ore on "Trout Hill" is very much alike on the surface. I can't say that the ore down the incline is just the same as at the surface. I found black manganese all the way down the incline; where I quit work it is hard; it grew harder going down and I could not blast it so easily. The strike of a vein is determine both by the color and by the wall; the quartz and the wall determine the strike.

"If the walls run north and south, can there be a cross-lead? Was there at that point of the Salmon incline different colors in the quartz?"

Yes, in the lead and in the quartz. It was streaked for a way and then mixed; the streaks were lighter than the sides—that is, the streak which I said disappeared east and south. There was no indications of walls east and west. I first knew that the Scratch Awl was staked in 1878.

Eli B. Holland was sworn and examined on the part of the plaintiff and testified as follows:

"I reside in Phillipsburg. I am a quartz miner. I know

214 the Salmon lode. I first knew it in 1866 or 1867, in the month of February or March. I saw the cropping along the strike of the lode for 200 or 250 feet; they were from 4 to 6 feet high and from 10 to 20 feet wide; the discovery is at the north end. I am familiar with the surface ground. I became interested in the Salmon in the summer of 1870; an incline was then run near the present incline about 10 or 12 feet west of it; about 40 feet deep inclined to the east. There was then no other work done on the lead except at the discovery. Estell and I did the first work on the shaft. We went down on the present incline more than 40 feet in the fall of 1877 or the spring of 1878. We found manganese and consider-

able ore—about 25 or 30 tons; it yielded 65 ounces. I am familiar with the country rock; east of the Salmon it is granite; west it is lime. The Salmon runs northerly and southerly and dips east. I was on the mine once since I sold out; they were then drifting at the 54-foot level. In the drift there was manganese and ore, the same kind as we had smelted; the incline had not reached
215 the hanging wall and dipped 40° or 45°; the lead is on a hog back. We put Pardee in the possession of the mine in March or April, 1879.

Cross-examination:

We found manganese in this incline and ore, in what proportion I can't say, at a depth of about 40 feet. I can't tell which way the ore ran. It was in both ends of the shaft; one stratum ran east and out. I found more ore out of that streak than in it. Black and brown manganese adjoined this streak. It may have been darker than at the surface. Some of the croppings were light when broken. We took out about twenty tons of ore from there. We encountered no granite on the incline. I do not know that I ever saw the east wall of the Salmon, and do not know how far east the granite is. There are granite boulders on the surface. To the solid formation it is 200 or three hundred feet. The granite is east of the air shaft. Coal-pits just below the air shaft show granite. I saw granite in the main shaft, where Murray & Durfee first started it. A granite boulder was in the southeast corner. I saw no lime in the main shaft.

James K. Pardee.

216 James K. Pardee was sworn and examined on the part of the plaintiff and testified as follows:

"I am the plaintiff. I reside in Phillipsburg. I am engaged in mining. I have been there ever since 1874, and have been mining since 1870. In Salt Lake I was a prospecter and owner. I am now the superintendent of the Algonquin Company. I am in the possession of the Salmon mine and am the owner. I got the deed for it in December, 1879. I had possession from March, 1879, to August 25, 1879. My right to the property came from Holland & Estell; they took me up and put me in possession of the mine. I am acquainted with the defendants.

"At any time did they or any of them enter the Salmon mine?"

They did; they mined, carried away, and milled ore from the Salmon. Merrill was the receiver and Murray and Durfee were laborers for him. The receiver was there in Schnepel's interest. They carried away ore for 20 or 30 days while I was in possession.

"During July and the 24 first days of August, what ore, if any, did the defendants, or any of them, take or carry away from the Salmon lode?"

They took away from 100 to 200 tons. I can't say whether
217 they worked all of July or not. Some of it was hauled from the mine in July. Its market value per ton in the mine was

50 or 60 oz. I had a conversation with Schnepel soon after the 9th of August, when we broke through. I had made an effort to compromise with Murray and Durfee, and then consulted Schnepel, as I knew he held a mortgage on the property. I took him down the incline. I took him into the 54-foot level.

"State what, if anything, the defendant Schnepel said to you with reference to the identity of the Salmon mine, and the place where the ore which you have testified concerning was taken out, and where and when and under what circumstances this conversation was had."

The day before I went to Dear Lodge to commence this suit, about the 22nd day of August, I went to the Salmon with Schnepel. We went down the incline and through the 54-foot level. I showed him the ore in the cross-cut. We went through the 72-foot cross-cut to the connection with the Murray and Durfee shaft. I showed him that the incline and cross-cut were in vein matter and all in the Salmon mine. I showed him the Murray & Durfee shaft
218 and the connection and the ore all the way down the incline. Schnepel said it was a hard thing for him to do; he said it was a hard thing for him to do to have to admit that he was wrong; that he had no idea we had so plain a case; that so far as the black vein matter goes I could hold the mine, and that he was satisfied that at the end of the cross-cut the Murray and Durfee shaft was in the Salmon mine or vein, and that he would have nothing further to do with Murray and Durfee. When we parted he said he thought we would have no trouble, giving me to understand that he would no further put up for Murray and Durfee. When we broke through I gave Merrill notice that I would hold him responsible for any more work. I had a conversation with Murray and Durfee prior to my conversation, when I endeavored to compromise. I am familiar with mines and quartz mining. I have pursued it for ten years. I am familiar with the Salmon. East of the Salmon the country rock is granite; on the west it is lime. The Salmon vein and the patented surface ground are not quite parallel. I know where the main shaft, the tunnel level, the cross-cuts and excavations worked by Mur-
219 ray and Durfee are. The apex of the Salmon lode is nearly in the centre of the Salmon location. The croppings of the Salmon vein are above the country rock for nearly 300 feet. They are on the Salmon surface. They start near the southerly end of the Salmon claim and run northerly until they pass out on the east side line 100 feet beyond the Salmon incline. I have observed the granite and lime for at least a mile; the width of the vein on the Estell is ninety-seven feet. On the Salmon there is no open cut, but the croppings are thirty feet wide. The Salmon vein is filled with ore—quartz ore, silver bearing, manganese, metamorphic limestone, sandstone, and a small portion with granite. In the 74-foot cross-cut, near the shaft, is a piece of the hanging wall, a horse of soft rotten granite. The west line in the foot wall is stratified or laminated, and generally in the shape in which it was found. The metamorphic lime in the vein is changed; soft, friable, and boulders, hard and granular on the outside, and on the inside blue.

This lime is in irregular masses. The dip of the vein near the Salmon and Cliff Extension is about 45°; parts of it from 20° to 70°. The Salmon and Cliff Extension are ore-bearing veins
220 in different places. At the north drift from the 54-feet level we had ore to start with and ore to quit on. The croppings 15 or 20 feet south of the incline are ore bearing; 500 or 600 tons of ore were taken out from the Cliff Extension, worth 50 or 60 ounces. Ore in the 54-feet level was, some of it, good, and some of it poor, but all of it contained silver. We had a well-defined vein north and south 12 feet wide in the 54-foot level. The length of the body of ore is north and south; the walls of a lead determine its direction. In the tunnel the first rock is granite, the second is manganise; the demarkation between them is as well defined as black and white. The next 200 or 300 feet to the foot wall of the Salmon is through vein matter, composed of maganese and vein matter. When the tunnel passes into the foot wall there is a seam of clay two feet thick. The Salmon vein is entirely dry. When the tunnel strikes the foot wall it encounters above. From the foot wall to the turn-table it is all limestone; at first it is metamorphic lime, but not highly so. Further on it is more like ordinary limestone. The turn-table is in
221 the foot wall of the Salmon. East of the turn-table the tunnel level is in blue limestone, and going towards the foot wall the rock gets lighter. From the foot wall to the end of the tunnel level is vein matter and ore, a well-defined streak of ore running east and west and a large body of quartz north and south; either side of the streak is vein matter, manganise, sandstone, &c. At the entrance end of the tunnel level it is granite, running north and south and dipping east. You can see it very plainly; there is ore in the drift proper, the end of the tunnel level running north and south. You cannot distinguish this ore from the ore in the lighter workings of the Salmon. There is a stope directly over the turn-table and running west from it. There is a body of base ore in it running nearly north and south, and exposed for 10 or 12 feet, dipping east of a vein; it is a vein running parallel to the Salmon. The cave in the tunnel dips east; so does the stratification at that point. The waste from the tunnel is composed of granite, manganise, sandstone stained, manganise, clay, laminated limestone,
222 blue limestone, black and brown, and some ore. The Salmon discovery is in a well-defined body of quartz; on each side is vein matter. From the Salmon incline to the mouth of the Murray and Durfee shaft is about sixty feet; the shaft is 7 or 8 feet from the Salmon side line and 18 or 20 feet lower than the top of the incline. The shaft north and opposite the Salmon discovery is in vein matter. The Murray and Durfee main shaft starts ¾ in granite and ¼ in grass roots. On the south and east side the granite continued down about 50 feet; then comes vein matter. The 72-foot cross-cut is entirely in vein matter. The inclination of the incline was not parallel to the inclination of the foot wall. When we reached the foot wall we changed the direction of the incline. The 72-foot cross-cut runs around and beyond the Murray and Durfee shaft. Beyond

the shaft the cross-cut is at first in ore, passes manganise, limestone, and comes into a regular rotten sand and then boulders. The drift around the shaft to the right is entirely in vein matter. The cross-cut at 120 feet is entirely in vein matter. The foot wall of the Salmon is not in sight on the incline until near
223 the bottom at about 120 feet. We found ore at the 120-foot cross-cut, a well-defined streak, running east through the vein matter *east*. The sixty-foot level is entirely in vein matter. All the available ore overhead is stoped out. The sides of that level are entirely vein matter. The bottom of the air-shaft is in vein matter, and continues to be, within 20 feet of the surface. When we went with the jury the timbers were removed in the air-shaft so I could see the granite, and I had Foote so indicate it on the map "C." The 100-foot level is entirely in vein matter. I saw there a well-defined streak of ore running east and west, and bodies putting in running north and south. The sides of this level are entirely vein matter as far as we could explore. It is 75 or 80 feet long. The main shaft is entirely in vein matter to near the bottom, where the foot wall of the Salmon appears. In the 120-foot level we went to the grant wall. Next to the wall is ore. This level is about 100 feet long and six feet high. The contact is plainly visible
25 or 30 feet wide near the west end of the Cliff Extension.
224 There is a hole right at the contact, one half in lime and one-half of the same in granite. A shaft at this point on the Providenta is entirely in line. I have traced the contact to Brown's gulch. At the Estell the contact was 97 feet wide. There is a hole in the manganise and one on the other side showing the foot-wall coming in; it is lime; the hanging wall is granite. The Estell discovery is one thousand feet from the Salmon.

"How does the filling of the Estell compare with the filling of the Salmon?"

It is very much alike; the vein matter is an exact counterpart of the Salmon. The ore at the Estell is poorer than at the Salmon. Outside of the character of the ore the vein is almost a fac-simile of the Salmon.

"Are there any other places in the contact where the ore is uncovered?"

Across Camp creek is the "Bowie;" at the Bowie lode the ore is visible in the contact. When this action was commenced the defendants were mining, hauling, and milling ore at the rate of 6 or 7
tons per day, and carrying ten tons per day to the mill. The
225 Salmon is the best-defined mine in the world. It has a prominent outcrop. It dips at 45°, and must cross the place where defendants were working. Thus I know they were on the Salmon lode.

Cross-examination:

I am as certain as I can be of anything that the defendants have been working on the Salmon. I believe there is no cross-vein. As far as my knowledge goes there is none. My knowledge goes from wall to wall. There is no cross-vein near either wall of the Salmon.

I am as positive of this fact as I am of anything I have testified to. There is a streak of ore east and west, which Murray and Durfee are working; it extends about 100 feet. In the tunnel level it extends from the end to the chute, about 70 or 80 feet. From the turn-table to my foot wall the only ore is at the turn-table. I have examined carefully and am certain. On the right side of the tunnel level, beyond the foot wall, is the first ore I have seen in that level. It is 8 or 10 feet from the Salmon foot wall. From that point there is a continuous streak up to the red ore, next to
226 the granite wall. The tunnel level does not end in a bank of manganise; it runs out of one against the granite; there is none of what is generally known as lime, *i. e.*, pure white lime, in this level. There is none in the mine. There is metamorphic lime; you can see the line of demarkation between the manganise and the lime. This level changes from lime to manganise just beyond the foot wall. A line at an angle of 45° from the mouth of the Salmon incline would strike the tunnel level about half-way from the foot wall to the end of the tunnel level; the angle is about 45°. I am better informed now than when I made my affidavit on injunction. I gave Foote no directions, except as to the blue line on map "C." He and De Lacy made the survey and made the map without my seeing it. The original hole that Estell started is 10 or 12 feet west of the Salmon incline; the west wall of Estell's incline is 20 feet west of the Salmon incline. If the Estell incline is on the foot wall, the foot wall is 20 feet west of the Salmon incline. If the foot wall of the Salmon is 30 feet west of the Salmon incline, the foot wall would strike the ore chute in the
227 tunnel level, if the dip is 45°. The Salmon lode is wider than the patent description. The croppings are 30 feet wide at the incline; veins are usually wider than the croppings. If the vein is in the center of a hogback the croppings are not liable to be wider than the vein. These croppings are solid; the vein carries ore 30 feet wide at the top and averages $15 or $20.00 per ton. All down the incline there is ore sticking on the sides; it is good ore. I bought ore from here, from Holland and Estell; two-thirds of it was good merchantable ore. Estell struck the foot wall at twenty feet. I never assayed the croppings of the Salmon mine; I think they go $20.00 per ton. Away from the incline the croppings would assay $100 per ton. I can get ore in the croppings which will assay $500.00 per ton. The quartz in discovery hole is the same as are the croppings, and appear to be the same quality. In general appearance the ore is the same, except as to richness. We found a body of ore over the turn-table, running north and south, and dipping east, of 8 or 10 feet. A little stringer went east; it did
228 not extend east of the turn-table. I examined and saw no ore on the tunnel level east of the turn-table to the foot wall. The ore at the turn-table did not seem to be a lead. I think the blue line (map "C") represents the hanging wall of the Salmon mine. It is a granite wash and lies something in that position. There is a granite horse about fifty feet down the main shaft; below it is vein matter. There is ore all the way down. There is no

streak running across the shaft; there are bodies of ore on the north side; there are bodies of ore at the north end of the shaft and at the 100-foot level. They had to drift out a foot or two before finding ore.

Affidavit here shown witness:

I made that affidavit; the shaft was then timbered. I made the affidavit from memory and had to guess at it; there is no prospect hole east of the Salmon line within 30 feet of it. There is granite on the tunnel level just east of the turn-table. A vein is a crevise in the earth filled with vein matter and valuable ore. I do not know how they are formed or filled. I found a granite
229 horse in the 72-foot level. The tunnel beyond the turn-table cuts granite. If granite occurs in a lime foot wall it is a curiosity. I found a curiosity at the end of the tunnel. It is not probable that my foot wall is back of the horse. I found granite horses in my foot wall and in the vein matter both. The foot wall is stratified blue lime; there is a seam of clay next to the foot wall of 12, 14, or 16 inches; the line east and west of the clay is different; the lime in the vein is metamorphic, light colored, and generally rotten. I know the lime was metamorphic, because pure limestone does not contain silica quartz. The metamorphoszed does. From mining journals, &c., I find this to be the accepted fact. On the tunnel level from the foot wall to the granite is metamorphic lime. Back of the foot wall it changes to a bluish lime; there is a marked change at the clay seam. I employed some men who dug into the Murray and Durfee works a little one day. I examined the rock where it was torn down. The sides of the tunnel level are soft. You can stick a pick in everywhere except in the ore streak.
230 They blasted in the tunnel level between the foot and the hanging walls. In the tunnel it is hard except in the manganise. A portion of the vein is hard and has to be blasted. Both the manganise and lime are hard and soft, but not so hard south of the foot wall in the tunnel as it is north. I found a vein of ore in the cross-cut at the end of the tunnel level with a well-defined dip under the hanging wall running east and west; this entire cross-cut is in ore; I had it assayed; it went $12.00. I found the same kind of ore in the end of the 120-foot level. The cross-cut and tunnel level ran into this body of ore and there stopped. I have got assays from manganise. I have worked manganise ore from the Trout mine as high as 200 ounces per ton from the 170-foot level of the Speckled Trout mine.

"How does that manganise in the Speckled Trout dip?"

It was in a body of other quartz, and about perpendicular. I never assayed any of the manganise in the Salmon mine. I found none here like the pay manganise of the Speckled Trout. So
231 I consider the Salmon manganise worthless, except as a vein filling. We had merchantable ore all the way through our works. I have taken a ton out of the incline since this suit was commenced. Ore in place is about 12 cubic feet to the ton. We did not run through ore all the way on the incline, but we had ore

all the way. I developed the incline for the purpose of this suit. If a streak of ore started at the main shaft on the angle of the stratification it would strike about the end of the tunnel level. From the 9th of August to the commencement of this suit they were stopeing in the tunnel level and on the 120-foot level. The ore ran about 70 or 80 ounces to the ton, and worth in the mines 50 or 60 ounces. If there were no tunnel there it would cost from $25 to $35.00 per ton to take out the ore. An ounce is worth $1.14. I do not know how much they got out from the 9th of August to the commencement of this suit. That ore is a base milling ore, containing sulphur of silver, lead, and copper. The streak varied in width up to as high as six feet. Stopes on the 60-foot level are about above those on the 120-foot level.

232 I took ten tons of ore from the 54-foot level; it averaged 50 or 60 ounces; the cross-cut from the 54-foot level is all quartz. The cross-cut is high enough to walk in, and four or five feet wide. If we have a mine it is in our mine. The ore there dips east. The cubic contents of that excavation are 720 cubic feet. At 12 cubic feet per ton that would be 120 tons, but much — came out was waste. I had an assay from here made by Cary, of the Algonquin Company. I do not remember what the ore went. I got an assay of 520 ounces from the bottom of the shaft, 15 or 20 feet from the Murray and Durfee shaft. There is not more than 10% lime in the Murray and Durfee ore. The ore in two places in the tunnel indicates silver. There is a streak of manganese in the upper wall of the cave. If there is such a thing as the Scratch Awl vein my works are on it. I put them there on purpose and I am in and on it. If there is ore back of the turn-table I should think that the Salmon mine is wider. There is a spot where there is ore at the turn-table, which is not in the Salmon mine. I do not find pay ore in the

233 lime in the Salmon vein matter; here the granite overhangs the lime, which is the reverse of what is generally true. The force which shoved the granite over may have changed its character. If the Salmon is a bed I never saw a vein. The Salmon vein is narrower as it goes down. When I made my affidavit for an injunction I had no measurement at the sixty-foot level. I think the Salmon mine goes as far as the Murray and Durfee shaft; the mine increases in width, as indicated by the blue line, map "C." Ore-streaks run at all angles; usually they run parallel with the vein. I do not know that I have had any experience of ore running directly across the vein. In the Salmon mine they do not all run across on the 54-foot cross-cut. It runs north and south and dips east. All shoots and streaks of ore on the Salmon mine run east and west. Show me anything except manganese and lime except on a line west of the works of Murray and Durfee. We took out 500 tons of ore this winter south of the Salmon incline.

234 "Is there not another location at the point you are now speaking of?"

"Between the 4th and 26 of December, A. D. 1876, did you tell Murray and Durfee, when you had some interests together in a difficulty with Van Timmens, that you thought it no harm to perjure yourself to win a mine?"

Never, so help me God.

State whether or no, between the 1st and 26th days of December, 1876, you did not request Durfee to swear that the Sharktown mine was located prior to the time the Scratch Awl was located, when it was known to you and Durfee that the Scratch Awl had been located prior to the Sharktown.

Did you not thus request Durfee, near the town of Phillipsburg, Deer Lodge county, Montana Territory?

I did not. Van Timmens notified me that, although the lodes were located on the same day, there was an agreement that the Sharktown lode should be the prior location.

"In your negotiations with Murray and Durfee did you recognize their title to the Scratch Awl? Did you receive a notice from Van Timmens?"

235 Yes.

"Did you not claim in 1876 or 1877 that there was a vein known as the Scratchawl, and so stated to Murray and Durfee?"

"Is there any such mine as the Scratchawl?"

There is a location known as the Scratchawl 600 feet or thereabouts west of the Salmon incline; it is 587 feet from the Salmon incline to the Scratchawl discovery. Murray and Durfee's works are within the surface boundaries of the Scratchawl. I don't know that there is any such mine. I milled some ore for them from there, or, perhaps, my successor milled it; it ran, perhaps, 50 ounces; at the works of Murray and Durfee there is no cross-vein; there is a cross-streak in the Salmon mine.

Redirect examination:

There is a hole at the Scratchawl discovery and west is an open cut in which is a well-defined streak of ore; this streak would cross the Cliff Extension 100 or 200 feet above the upper workings of the Salmon mine. The "curiosity" I spoke of is something unusual.

236 "What do you say as to whether or not this granite boulder is a part of the curious condition of the granite overhanging the lime?"

The boulder is the greater curiosity; water and air slack-lime; exposure decomposes lime found in the neighborhood of veins.

Recross-examination:

I ran past the Murray and Durfee shaft after this suit was commenced; Murray and Durfee had been at work on the morning that I jumped the mine.

Harvey Showers was sworn and examined and testified, on the part of the plaintiff, as follows:

I am the foreman of the Algonquin mill at Phillipsburg. I have been a quartz miner since 1868. I am familiar with veins, &c., and with the Salmon mine. I had charge of it from May, 1879, to October, 1879. I worked on it during that time; it runs northerly and southerly. The croppings of the Salmon extend over 300 feet

on it to a point about 225 feet north of the Salmon discovery; the croppings are of silver quartz; they are 5 or 6 feet high; there
237 is only one break in the croppings, caused, perhaps, by digging a road. I sank the incline from the 54-foot level and blasted off the croppings for a whim. We got ore from three croppings—silver quartz, showing galena and copper, the country rock or granite, and lime; there is granite in the air-shaft and lime in the incline at a dip of 45° or 50° east; the Murray and Durfee shaft starts in loam in slide rock, manganise quartz. I found manganise quartz in the north level from the incline running north and dipping east. I ran a cross-cut there through silver quartz. I ran the incline down 20 feet and cross-cut to the Murray and Durfee shaft through quartz and manganise and some lime darker than the foot-wall lime. I found ore in this cross-cut; it ran east and dipped east; we then continued the incline through vein matter. We changed the course of the incline and ran it steeper to keep out of the foot-wall. I sank it 95 feet, and that far I found vein matter and some ore in bunches. Murray and Durfee'- 60-foot level is through vein matter and quartz. The top of the air-shaft
238 was for three or four feet in black soil; it then struck granite, which it went through 18 or 20 feet. The 100-foot level is the same as the sixty-foot level, manganise, &c. It is in vein matter. I saw ore there which looks like the ore in the Salmon incline.

"Did that level go through the country rock, the granite, or limestone?"

I could not tell what those boulders were. A foot wall is not made of boulders. The tunnel level is through lime, manganise quartz, and clay vein matter. I saw ore in this level.

Witness here describes places where the contact can be seen from the Algonquin road to Brown's gulch. The tunnel starts in at granite; I helped make the measurements. Out of the granite is a soft streak of yellow lime of 5 or 6 inches; then the lime gets harder. The tunnel runs through lime $\frac{1}{3}$ of the way. There is more manganise; the tunnel runs through vein matter until it got within 50 or 60 feet of the turn-table; then it strikes the foot wall. Here the water comes in and there is a big seam.

"What are the materials of the contact?"

239 I saw no ore there. There was an opening filled with soft, yellow stuff. The seam was north and south and cut the tunnel at an angle. Beyond the seam was the foot wall. Before the seam appeared the tunnel was in manganise and lime, dipping a little east. East from the turn-table for 30 or 40 feet was lime, and then a talc seam. The tunnel level was in vein matter. At the end of the tunnel level I found a talc seam running north and south at an angle with the level. Behind the talc I found ore and chutes of granite mixed with the talc. The ore in the Salmon incline stands nearly perpendicular. I took out sixty tons from the upper Salmon and Cliff Extension. It lies southeast and northwest, and dips east, and dips both ways. Since Pardee came into possession 500 or 600 tons have been taken out. At the end of the tunnel level, on the left side I saw red ore, which laid north and

south—*i. e.*, the face as exposed. There was a cross-cut of 4 or 5 feet which showed red quartz. During July and August, the
240 23d day of August, 1879, defendants took out 175 or 200 tons of ore. In August, A. D. 1876, Durfee and I were close to the discovery hole of the Salmon mine; he picked up a piece of ore and said "Here is the only place he could find such ore"—*i. e.*, on the Salmon croppings; he showed me the line of Holland and Estell. I said I would sink on the outside and get out several tons before they could drift down and find it. There was nothing said about it being on the Salmon lode. I said I would sink there, knowing that everything on that hill dipped east.

Cross-examination:

And the witness testified:

"The Murray and Durfee shaft is 3 or 4 feet outside of the Salmon mine. We sunk a shaft some sixty feet west and an air-shaft east. There was also a hole sixty feet north of the main shaft, 4 or 5 feet outside of Murray and Durfee's ground, in soft sandstone. The hole is caved in and I do not know what is in it. It is called the Sharktown discovery. The hole Murray and Durfee finally sank was opposite the side of the Salmon croppings and about
241 75 feet east. I don't know how much ore defendants took out between August 9 and August 25. The whim of which I spoke is west of the Murray & Durfee works. It would not be on the line of the Murray and Durfee streak of ore. The croppings would run from 10 to 20 ounces. In grading for a horse-walk for the whim southwest from the Salmon incline I found lime, which looked to me like the Salmon foot wall. We drew up from the incline 12 or 15 tons of ore. The ore was to the left going down and bunches on the right. We found a white sticky talc in the levels east of the incline. The quartz in the south drift from the 54-foot cross-cut is mostly maganèse and is at an angle of about 60°. Some of it carries silver. We save one and a half or two tons. In the tunnel near the cave is a black maganèse. It is a streak running along the tunnel. I think we then met lime; then a streak of maganèse again. The rock on each side of the clay seam in the tunnel is lime. I saw a large clay seam in the tunnel level which looked different from the clay seam in the tunnel itself. It was green here, and in the tunnel a yellow color. On the tunnel level east of the
242 foot wall was dark brown lime and white strata. At the end of the tunnel level I found a green seam of clay or talc. Back from the end overhead we found some ore in black manganèse. We pulled some blocks of loose granite from the end of this level and found quartz which was running north and south all the way along the cut. There is a bunch of ore at the turn-table. I think there was ore in the tunnel level near the winze.

Redirect examination:

"Take the ore-shoot crossing the Salmon mine and prospect it west through the foot wall, what would be the direction and where would it come out?"

It would strike a short way above the northwest mill.

"How would it go in relation to the Scratch Awl discovery?"

South. The line in the foot wall is blue. In the vein it is whiter. Some of it is brown and generally softer than the foot wall. I never worked in a mine where one vein crossed another. I took
243 the clay seam to be the beginning of the foot wall, and then I found the blue line, which began at the turn-table.

Recross-examination:

At the clay seam there was no evidence of a foot wall. I was with Foote and De Lacy when they made the survey.

"Did you hear Pardee give any directions to the surveyors?"

I did. Forty feet out on the tunnel level, near the first ore chute, Mr. Pardee called to Murray and said: "Charlie, can you show any ore here?" Murray said: "You can see, gentlemen, what there is here."

Pardee gave no directions that I recollect.

"Did not De Lacy tell Pardee he would make no memoranda unless Pardee desired him?"

No, sir.

H. K. Phillips, sworn and examined on the part of the plaintiff, *and* testified as follows:

"I live at Hasmark near Phillipsburg; have been near Phillipsburg for two years. I am a quartz miner, and have been for
244 14 years, in Colorado, Utah, California, Montana, and Black Hills. I can tell quartz mines when I see them. I have examined the Salmon mine; it is a quartz lode. I don't know what a contact vein is. I have understood that the Salmon mine is one. I have worked on it since October 4 or 6, 1879. It dips 45° or 50° east. I can trace the Salmon lode by the croppings about 300 feet. We took ore from the 72-foot cross-cut and from the bottom of the incline. The incline strikes the foot wall down about 100 feet. The foot wall was pitching east. The lowest cross-cut is through vein matter and quartz—all vein matter. I worked in Murray and Durfee's 120-foot level. The hard croppings of the Salmon are 18 or 20 feet wide. From the east line of the croppings on the Salmon incline to the Murray & Durfee shaft is 60 or 65 feet. In July and to the 16 or 17 of August, 1879, I was timberman in the 120, 100, and 60 foot levels. During that time the miners were working all the way from the tunnel level to the 60-foot level.

"How much ore did they take out, if any, during July?"
245 I should judge 6 or 7 tons per day. It was silver-bearing ore. The levels of Murray and Durfee are not through wall rock. They are through vein matter. I have worked on the Estell. The vein there is near 100 feet wide. The east wall is granite and the west is lime, and in that respect resembles the Salmon considerably. The croppings are very near alike. At the junction of the Salmon and the Cliff Extension there is ore which runs about north and south. I have assisted in taking out 300 or 400 tons from the 50 and 100 foot levels; that ore is like the ore from the Salmon in-

cline and dips east. I have examined the Murray and Durfee air-shaft. The upper portion is in granite; the lower part is timbered, and I could not see. The foot of it is in maganise vein matter. At that point there is a blue casing with bunches of granite. There is some quartz at that point that runs northerly and southerly. The main shaft starts in loam on the west side. On the east side I could not see. I saw some granite on the south side as if tailing out. The Salmon vein is very dry. In passing through the foot wall
246 you find water. The west end of the 120-foot level is driven in lime. I saw no vein matter or ore there. The ore from the Murray and Durfee works and from the Salmon mine are much alike.

Cross-examination:

The ore in the same vicinity sometimes differs.

(Here witness was shown some specimens.)

I should judge that this specimen came out of those workings. I can't tell the value of ore by working at it. I have seen ore looking like that marked by the assayer as high as $500.00 per ton. The end of the 120-foot level was filled up. At the end of veins it is not my experience that it can be picked. Country rock is oftener softer than the vein, but not soft enough to be picked out.

"Did you work out a vein of ore for Murray and Durfee running east and west?"

I should not call it a vein, but a shoot. A shoot generally runs diagonally across the vein. I have seen a shoot 90 feet deep in Colorado. I have seen what they call shoots in Phillipsburg;
247 there are nothing but shoots there—they are all shoots. I should not call the Salmon mine a shoot; the Murray and Durfee is a shoot from the Salmon; it runs easterly and westerly; it varies in width from 6 inches to 2 or 3 feet. I cannot tell any place where the hanging wall of the Salmon is unless there (pointing to the blue line on map "C").

I should judge from the air-shaft and the 60-foot level it was near the end of the 60-foot level in the 72-foot cross-cut. I can't tell where the hanging wall is. From the turn-table to the foot wall I should not call it vein matter. The foot wall is hard and smooth. In the vein matter there is a gauge by which I distinguish the vein matter from the foot-wall.

"Is the material east of the Clay seam harder than west?"

I don't know that it is so. The tunnel looked black up to where the water commenced; whether it was from smoke or whether it was manganise I don't know.

"Can you say that the Salmon extends as far east as the croppings?"

248 I should say the vein extends further east than the east side of the croppings; I should say that the croppings had not broken and fallen over. I saw granite on the tunnel level which I would call a wall. I would not look any further for a lead after sinking it.

Redirect examination:

"Is this the same granite of which you testified in chief?"
Yes.

George Plaisted, sworn and examined on the part of the plaintiff, testified as follows:

"I have lived in Phillipsburg since the fall of 1870; have been familiar with quartz mining since 1851. I know the Salmon lode and am familiar with the formation of the formation of the country. The Salmon mine is a contact vein. A contact vein is a vein between two kinds of country rock. I am familiar with the course of the Salmon contact. I have observed it for one-half mile from Frost creek beyond the Bowie. I have mined in California in 1851; on Carson Hill, Nevada, Mariposa county, the Comstock. I was millwright on the Comstock 5 years. The direction of the
249 Salmon mine is north and south. You can trace the surface croppings for 300 feet, and on the contact for 1,000 or 1,200 feet. You can see the contact in Frost creek, Cliff Extension, Salmon, Estell, and Bowie. It is a large mine and very distinct. The direction of the vein and the quality of the ore on the Salmon and Estell are very similar. I have seen the contact at the Algonquin road. I have examined the shaft on the Cliff Extension, the discovery, and some holes below. The formation is granite on the east and lime on the west. In the Bonanza discovery the contact is visible, and also in a ditch which I dug there in 1872. Going north towards the Salmon there are several shafts east and west where the granite and lime are visible. The contact and vein matter dip east about 45°. The incline did not strike the foot wall when I was there in August. I went through the 72-foot cross-cut. It is in vein matter, manganese, quartz, lime, and some granite. The incline is through the same material. Vein matter is anything between two walls. The foot wall is lime. I never saw the hanging wall in the mine. I can't judge of the width.
250 "How does a mountain on one side and a valley on the other affect the dip of a vein?"
It pitches into the hill at the apex and then turns over further down. I never had an experience of primitive rock overlying secondary rock. The lime in the vein is rotten—destroyed pretty much. Some call it metamorphic.

Cross-examination:

I was timberman on Carson hill; I have mined myself, but have generally been a superintendent; I mined 10 months with my own hands—in 1855 & 1856—in Nevada county; on the Comstock I was a mechanic; at Cable I was a superintendent.
"Does it depend upon its length to constitute a vein a contact?"
I don't know that it does. I never had anything to do with beds and don't know what they are. Veins stand on an angle; beds I believe lie level. I know nothing of beds. The Salmon is a vein; it looks like what I have always heard called a vein. It might

turn out — bed, but a very large one. Primitive rock is not necessary for a contact vein.

251 "Can a contact vein exist where the hanging wall is material washed in, and not primitive rock?"

It may, but I know of no such place in Montana. If the so-called hanging wall is a wash we would still call it a hanging wall. I don't know whether a bed would have a hanging wall. The Salmon shows a reversal of the order of nature, and I am satisfied that the granite will turn over somewhere and become the foot wall. Lime is sometimes vein matter; it is so at Cable. Lime decomposed with manganese is vein matter in the Salmon. In most places in that district lime is the country rock on both sides of the veins. If streaks ran in the same direction I should not call them all one vein until the- came together. Before they came together they would be separate veins.

"Is not that the formation of the Salmon?"

I saw only two streaks in the Salmon. In the 52-foot level there is quartz; in the 72-foot level there is granite boulders. The Murray and Durfee main shaft cuts the vein. A "horse" is a part of the wall rock. If this horse in the 72-foot level fell, it fell from the granite wall. I never saw a granite horse fall 30 or 40 feet

252 through the vein to the foot wall.

Redirect examination:

I have seen an instance of the foot wall and hanging wall changing places as the vein went down.

Where?

The Comstock; county rock fallen into the vein is acted on in some way to destroy it, and is then called vein matter.

George C. Sloss was then sworn and examined on the part of the plaintiff and testified as follows:

"I live at Silver Lake, Deer Lodge county, Montana Territory. I have been a quartz miner 13 years in California and Montana. I am familiar with mines and can tell them when I see them. I first saw the surface of the Salmon in 1878. The vein was easily trac-able by a well-defined line of croppings 6 or 7 feet high for about 300 feet. In December, 1879, I examined Pardee's excavations. The country rock is lime on the west and granite on the east. They are distinct. The Salmon is a contact vein dipping

253 45°, filled with vein matter, oxide of manganese, lime, and quartz. I saw in Pardee's works ore, which, from my experience, I would call valuable silver-bearing ore. It is a free roasting ore. The Salmon incline passes through vein matter for some distance. It changes its inclination on the way down. In the vein the lime is in boulders, decomposed and stained by oxide of manganese. There is no wall between the incline and the main shaft. In the cross-cut from the north drift in the 54-foot level is the same vein matter as the incline is in. In the top is a mass of good quartz. On the right of the drift, before the cross-cut, is a mass of quartz. On the left going in is a bunch of ore. The south level is in the

same sort of vein matter. In the face of the drift around the Murray and Durfee shaft is vein matter. I don't recollect any ore here. I went to the bottom of the Cliff Extension works. The ore body there was southwest and northeast, pitching east. It was a body of good milling ore. I examined the contact to Frost creek. Where the surface is removed the contact is distinct. I saw a hole
254 in the Providenta wholly in lime. The *the* general dip of the Salmon is 45° or 50°. The croppings were almost continuous from the Salmon discovery to the incline.

Cross-examination:

The drift from the 54-foot level was in vein matter. I saw no ore on the face of the north drift.

Redirect examination:

There is granite in the cross-cut to the right of the main shaft. To the left I saw no granite.

By the COURT: "What is a man-hole?"

There is no such term that I ever heard.

45° means from the horizontal.

Plaintiff offered in evidence the records of Deer Lodge county of the location of the Salmon lode, book "E," page 5. Testimony of the recorder waived by the defendants.

Thomas W. Fisher, sworn and examined on the part of the plaintiff, testified as follows:

I am running the Algonquin mill. I have been a quartz miner since 1859. I can tell quartz lodes and ores when I see them.
255 I *I* know the Salmon; it is a contact vein between granite and lime, and dips 65° or 68°. I saw the Salmon in 1875, and again in 1879. What I supposed to be the foot wall is lime. I saw the contact exposed at the "Algonquin" road and at the Estell; these points are ¼ or ½ mile apart. The general course of the contact is west of north and east of south; the general course of the Salmon is the same. The Salmon incline is sunk in vein matter. The 54-foot level is in vein matter. I saw ore in the north drift from this level, but none in the south. I found ore in one place in the 72-foot level; this level runs through vein matter and connects with a shaft. I saw granite here in spots, in nests—large masses in the vein matter. The incline is run in vein matter. The lowest cross-cut from the incline is in the same matter. I saw quartz in one place there—the croppings on the surface for 350 to 375 feet northerly and southerly. Ore has been brought from the Cliff Extension to the Algonquin mill—more than 200 tons. At the Algonquin road there is a bank of 3 or 4 feet, and you can see the
256 granite on the east and the lime on the west; the croppings of the Salmon vary in width.

Cross-examination:

I can't tell the width of the Salmon vein at the incline. The vein matter of the Salmon is dark manganise mixed with quartz.

The Salmon incline is on or near the foot wall, and the side drifts from the 54-foot level are on the foot wall. If there is a cross vein the Murray and Durfee levels and the Salmon incline are both on it. A contact vein is a vein between two different materials.

Hector Horton was then sworn and examined on the part of the plaintiff and testified:

"I reside at Phillipsburg, and am a miner. I can tell lodes and ore when I see them. I am familiar with the Salmon. I first found it in June, 1865. The country rock is granite in the hanging wall and lime in the foot wall. The contact is traceable for nearly a mile. I can't tell the width. The ore is valuable. The vein dips east 45°. The incline runs through vein matter; there is ore
257 in it. The 72-foot cross-cut runs through vein matter with ore in it. Around the Murray and Durfee shaft, to the right, was the same material as before. To the left was granite, and in one or two places ore. The cross-cut in the bottom of the incline is in vein matter, which continued to the shaft. The north drift from the 54-foot level is in vein matter and discolored quartz. I went into the south level for 20 feet through vein matter. The dip of the ore in the Salmon and Cliff Extension is near the same, On the Estelle the croppings run north and south about the same as on the Salmon; the relations of the lime and granite are the same. I made an excavation on the Estell and came to what I called the foot wall, pitching east."

Cross-examination:

I found pay ore on the Salmon discovery. I had it assayed. It ran about 30 ounces. I think none of it was worked. It was black manganese, which resembled the other in the contact. I measured the croppings on the Salmon in the fall of 1868. They were
258 28 feet wide at the incline. At the discovery they were 7 or 8 feet wide, and stick out of the ground 2 or 3 feet. They get narrower going north; going south from the incline they are narrower. The two widest places were at the Salmon and Cliff Extension line and at the incline. I did not know the width of the Salmon. I could not tell, from any excavations I saw in that mine, where the foot wall is. I saw a piece of granite in the 72-foot level which I thought was the hanging wall; it was beyond the Murray and Durfee shaft.

Redirect examination:

I thought it a part of the hanging wall in place.

Michael Duffey was then sworn and examined on the part of the plaintiff and testified:

I have lived in Phillipsburg since 1867. I have mined—mined in Nevada 4 years. I am familiar with quartz lodes. At the Salmon the country rock is lime on the west and granite on the east. I have seen the contact. The Salmon lies north of the contact. The Salmon, I think, runs north and south. The contact runs north

and south. I suppose the Salmon is a contact vein. I don't
259 know that I have seen contact veins. The croppings of the Salmon run north and south and are easily traceable. The Salmon incline runs through manganise, lime, and quartz. The manganise is vein matter. The cross-cuts are in vein matter. The Cliff Extension dips east; the course is north and south. The Cliff Extension ore is good.

William Lowar was then sworn and examined on the part of the plaintiff and testified as follows:

I live in Phillipsburg; I have been engaged in quartz mining for 16 or 17 years. I have mined in Wisconsin, North Carolina, Georgia, Tennessee, Colorado, and Montana. I have seen the Salmon mine; it is a contact vein. The foot wall is lime and the hanging wall is granite. The contact is traceable for a mile. There is silver ore in the Salmon mine. It dips east. The incline is mostly through manganise or ore. The foot wall is about at the 54-foot level. The incline changes its dip at the foot wall. At the 54-foot level there is a drift 25 feet on one side and 20 feet on the other. They run through manganise ore and some granite
260 boulders fallen in and decomposed. The tunnel level runs through lead matter, which continues to the shaft and a little beyond. The cross-cut at the foot of the incline is in manganise and lead matter. The croppings of the Estell are not so rich as the Salmon and Cliff Extension.

Cross-examination:

The vein varies in width. The width of the Estell is no evidence of the width of the Salmon. A contact vein is one in which the walls are of different materials. If both sides are lime it is not a contact. The first manganise in the tunnel would be a contact. A vein with lime on both sides would be a fissure vein. The foot wall of the Salmon is not more than 10 or 12 feet from the Salmon incline.

John G. McLean was then sworn and examined, on the part of the plaintiff, and testified:

I live in Phillipsburg. I never mined there. I have mined in California and British Columbia. I am a judge of quartz mines. I am familiar with the Salmon and the country rock. The
261 Salmon is a contact between lime and granite. I have traced it from East Comanche to Frost creek for a mile. It is filled with mineral matter in every opening made in it. The Salmon dips east; the Bowie dips east about 60°. The croppings are manganise; they run on the Bowie, Estell, Salmon, Speckled Trout, and Algonquin; they are all about alike; the Salmon incline is in manganise and some silver ore—pay ore. In the north drift of [the] 54-foot level there was a nice body of ore; in the south drift was vein matter and some galena. The 72-foot cross-cut is through vein matter, and near the shaft is a decomposed boulder. We found ore in the cuts across the shaft; it was vein matter as far as I could see;

the bottom cross-cut is in the same material. The Murray and Durfee shaft is through manganèse. One side of the 120-foot level is through granite; at the end of it I saw quartz; the other side of the level looked like manganèse and lime; it was decayed; the hanging wall struck south of east and dipped east; there was water in the bottom of the mine; the tunnel commenced in granite; at 60 or 100 feet it went through a stratum
262 of manganèse into vein matter 10 or 12 feet thick; it then enters a sort of decomposed lime; this I do not call vein matter; I call it country rock—the foot wall; that foot wall was 20 or 30 feet thick; then we came to a stratum of quartz crossing the tunnel; then came soft lime. I was now about 140 feet into the tunnel; the mine was there wet. There was more water where the ledge crossed. In my judgment the Salmon and the Murray and Durfee workings are one mine. The Salmon dips uniformly as far as I could see. I saw a very nice body of ore in the Cliff Extension works.

Cross-examination:

Witness shown on the map the manganèse vein near the granite passing the manganèse into the lime. That limes is mixed with veinish matter. We them come to a small ledge of manganèse; they had not then reached the third stratum of manganèse. There had been very hard lime in the tunnel. Beyond the first manganèse streak there was lime and then a streak of soft lime. I think
263 they blasted through the lime. Between the granite and the first lime in the tunnel is a contact vein and the first lime beyond is the foot wall of the Salmon. At 200 feet in the tunnel was lime, and if there is a vein further in the tunnel it is not a contact vein. I can't say that the tunnel strikes the Salmon vein. I don't know that the defendants are working in the Salmon. Judging from the map I should say they were.

James Stoner was then sworn and examined on the part of the plaintiff and testified as follows:

"I am a miner; I live in Butte; I am familiar with the Salmon; there are big croppings between the granite and the lime; such veins are called contacts; I have been in the incline; it is sunk in manganèse and silver ore. At 45 or fifty feet there are two levels—the one north and the other south; the north level is silver ore; there is manganèse on the west side of the incline. At 72 feet there is a level to the Murray and Durfee shaft; it is in vein matter; it runs through limestone to the shaft and there strik-s granite.
264 First is a streak of talc and then granite, which I pronounce the hanging wall of the Salmon mine. I saw granite in the whole face of this level, except one streak of ore; breaking through the granite the ore was distinctly traceable. The granite was soft and stained with oxide of iron, I should judge. I traced the contact about 300 feet; the lime and granite on either side are very distinct."

Cross-examination:

The 72-foot cross-cut is all in vein matter. The hanging wall is in this level within 6 or 8 feet of the Murray and Durfee shaft. Passing through this granite I found a vein of ore running east and west.

Con. Murphy was then sworn and examined on the part of the plaintiff and testified:

I reside in Phillipsburg; I have followed the honorable occupation of mining, but it was 17 years ago; I have been in the Salmon mine; it is called a contact vein; I saw some lime and some granite and some vein matter between; what I thought was the foot
265 wall dipped east 45° or 50°; the incline was in what looked to me vein matter; I saw bunches of ore; the 72-foot cross-cut was dug through vein matter and ran against a piece of granite or portion of the hanging wall shoved in there; it looked soft and clayey and slackened; there is ore in the Cliff Extension works; the dip and strike are the same as in the lower workings; I found granite, which I thought was the hanging wall, 6 or 8 feet beyond the shaft in the 72-foot cut.

Cross-examination:

I did not examine the tunnel.

Louis Saibling was then sworn and examined on the part of the plaintiff and testified as follows:

I have been engaged in quartz mining 9 years; I am familiar with the Salmon mine; I worked on it four months; I ran part of the tunnel; the Salmon is a quartz mine running north and south and dipping east; the incline and cross-cuts are in lead matter; there is some ore there in the north level; the Salmon was
266 dry until near the last level; 8 or 8 feet from the bottom the water came in from the right; the incline is on the foot wall a good part of the way; I saw croppings for 60 feet or more both above and below the incline; we blasted off the croppings for a whim and got some silver ore; leaving the surface ground the tunnel runs more or less in lead matter for 80 or 90 feet, when we came to lime and talc; then we drove through until we struck quartz on the right side; 8 or 10 feet further we struck it on the left; it continued 10 or 12 feet; we then came to soft, heavy, decomposed granite of regular formation—not a boulder.

Cross-examination:

We struck a vein of ore about 480 feet from the mouth of the tunnel; it was in lime.

"Did you find any talc seams or foot wall in the tunnel?"

Well, no.

"How many clay seams did you cross?"

My God Almighty! I can't tell. At 120 feet we passed
267 through the manganese into lead matter—a streak of manga-

nise, which I took to be a lead. At the turn-table there was a little bunch of ore in the roof in the granite. I made my affidavit on the injunction from information of a man who was backing with me. The tunnel starts in surface ground—a mixture of granite and manganise. I can't say where the foot wall of the Salmon is; I can form no idea. The ore in the Salmon incline was in strata running north and south; I found none running east and west; I suppose we were running on the foot wall; can't say where it is; no one can say that. I don't recollect of seeing any lime in the foot wall.

"Did you find anything to indicate either a hanging or foot wall of the Salmon mine?"

I can't say; it is probably back of the Salmon incline; but as to that I can't say. In running the tunnel I found nothing that looked like the foot wall as shown in the incline.

"Can you go into the mine and locate the hanging wall?"

Damned if I know; I could not pick it out; I don't think any one could; I don't see how any one could come at the place
268 where the hanging wall is.

Redirect examination:

"What way was the hanging wall from the observations which you made?"

The plaintiff here offered in evidence the following papers, viz:

1. The judgment roll in case No. 1366 in this court.
2. Order of sale in the same case.
3. *Præcipe* for order of sale in the same case.
4. A stipulation in the same case.
5. Oath of the receiver in the same case.
6. Order appointing a receiver in the same case.
7. Order to show cause in the same case.

Whereupon the plaintiff rests his case.

U. B. Ringling was then sworn and examined on the part of the defendants and testified as follows:

I am a surveyor and engineer; I made the survey of the Scratchall and made some measurements of the Salmon mine from the Scratchall. By the Scratchall I mean what has been called the working of Murray and Durfee. I measured through the
269 levels and down the shaft.

The maps prepared by the witness are here produced in evidence.

I made those maps from the measurements I took; the Scratchall works are platted exactly as they are in the mine from an actual survey. I examined the formation; the second streak in the tunnel is a vein 15 feet wide. The next is hard limestone for a distance of 80 feet; the next was a brown streak, a vein 40 feet wide; then came hard white limestone 34 feet and similar to the first; the next was a dark vein 39 feet, darker than the first vein; the next was a

stratum of white lime with a yellow streak; next a clay seam, and then 69 feet of white lime streaked with blue; then came two veins, and then blue lime or shale at 12 or 13 feet from the turn-table. This shale contained a granite seam 2 or 3 feet wide, then passed into blue lime or shaft streaked with white lime. I saw no granite in the drift from the turn-table; going east on the tunnel level there was blue lime and a yellow streak. At the
270 chute, 75 feet from the turn-table, there seems to be a vein running down which is 21 feet wide. The white lime beyond the turn-table is 32 feet wide; there is a vein coming down on the same dip as the other; the end of the tunnel runs into a vein; the 60-foot level is 83 feet long; the 100-foot level is 109 feet long; the 120-foot level is 113 feet long; there is ore in the west and east sides of the Scratch Awl shaft; there is ore on the levels; the air-shaft runs through granite down into vein matter, vertically, from the mouth of the incline to the tunnel level 199.7 feet. The ore in the Murray and Durfee works appeared to me to be perpendicular, and run east and west. I saw granite in the Salmon incline similar to the granite at the foot of the Scratch Awl shaft; the granite near the mouth of the shafts seems to me like granite wash.

Cross-examination:

I have not got a diploma as a civil engineer, or as a mining engineer; I have followed both; I have been an engineer on railroads; in making the st-atification on my map I was guided by observations in the tunnel, the levels, and the Salmon incline; the lines
271 from the tunnel to the tunnel level are supposed lines. I was there 8 or 10 times; August 28 was the first time I was there; I was assisted not by any one & furnished by Murphey; I made the maps; no one assisted me; no one gave me any suggestions. The tunnel is timbered for 80 feet, but I could see the change in the rock through the timbers; the soft lime does not cross the tunnel; it is pockety and I thought it not a continuous streak; I do not remember any ore in this manganese. (Points to the map.) Murray & Durfee and two Chinamen assisted me; I verified all measurements with a steel tape; this ore and the seams in it in the 60-foot level are perpendicular; the incline was timbered, and I had no tools to examine it; there were manganese veins in the lime.

James E. Durfee was then sworn and examined on the part of the defendants and testified as follows:

I am one of the defendants in this suit, and am familiar with the premises, and have been in the Flint Creek district since the year 1867; I found croppings and float east of the Salmon
272 and followed them up. Some of them were 800 feet east of the Salmon. I found some float in the croppings, which I followed to where I sunk the shaft. I found croppings west of the Salmon. I found good melting ore 150 or 200 feet west of the Salmon on the surface. I sunk some shafts and prospect holes on the line of the croppings. I got ten tons of ore from the shaft, which I had milled, and it returned about eighty ounces. The ground where

the shaft is is on ground 20 feet higher than the Salmon incline. Between them the country rock is lime. There is a depression between them, and the rock is but little exposed. At one place, at 100 feet from the Salmon, I found boulders of good ore. I made some slight excavations, and found streaks of a vein bearing silver and running east and west. I sunk a shaft about 60 feet west of the Salmon incline about 25 feet deep and found ore running east and west. I cannot tell how wide it was. In a shaft 35 feet west of the Salmon incline, which is now filled up, I found a well-defined lead of ore running east and west and 18 or 20 inches wide
273 on the east side. It run east and west and 30 feet below where I was on a ladder. It came to the surface and was a good quality of ore and resembled the Scratch Awl. That is the Dietesheimer shaft. I have followed quartz mining in Montana since 1867, except 2½ years. I am familiar with the character of the mines in the Flint Creek district.

"Are there croppings of a cross-lead running as I said—east and west of the Salmon?"

Yes. Some of them are blasted off, but one can still see them. The Scratchall croppings show good pay, and there is no pay in the north and south croppings. The ore croppings east and west show copper; the north and south ones do not. At the crossing the croppings extend out to east and west. At the crossing they were 20 feet wide and outside of it not more than four or five feet wide.

"State if there is any break in the croppings."

There is a break 40 feet south of the incline. South of the break the croppings are 4 or 5 feet wide. At the Salmon discovery they are 3½ feet. I helped run the tunnel level. We found
274 ore in the tunnel level west of the turn-table, past the blue streak in the top and bottom of the level, and sometimes on our side, varying from 1½ inches to 2 feet. At the turn-table there was a large body of ore; from the turn-table, east, to the talc there was ore all the way on both sides. It ran the whole length of the turn-table. I found a large body of ore west of the turn-table. The ore from the talc to the turn-table was more base than that east. This was in the water. Ore increases in baseness in the water. The stope above the turn-table extends 12 or 15 feet east of the turn-table. I picked into the walls of the tunnel level. They are lime all the way. At the chute I found a black streak like manganise—like the material in the Salmon incline. At the end of the tunnel level is a cut into a bunch of ore putting out from the east and west lead. The level ends in soft stuff and manganise. Going into the tunnel there is granite for 60 feet; there is a streak of manganise diagonally for 15 or 16 feet; then lime, hard, and in places
275 broken. In one place there was a pocket of black sand overhead. The lime was hard and was blasted. Next was a black streak of manganise with a bunch of quartz, some of which was pay. We ran a branch here; the ore extended 4 or 5 feet in it. I ran it because I thought the ore ran in that way. Beyond the second lime we came to a stained lime, and then a kind of manganise. Next was lime, which continued to the Scratchall vein.

From this point to the turn-table was a streak of blue, white, and yellow. Here the water came in; then a dry streak of 20 feet. Before the dry streak there was a clay streak from 2 to 6 inches; then came some yellow and blue lime that required blasting. The first half of the lime in the tunnel was harder than the last half. The granite at the beginning of the tunnel was soft. The Scratchall shaft was started in loam and boulders. Fifteen inches from the surface was ore running east and west. The shaft is 8 x 4 feet, 4 feet east and west. The ore at first was in the north end; on the south end granite and ore came in at four feet. We
276 followed down until the north side was granite and the *north side was granite and the* south lime. Down 14 or 15 feet we came to stained rock, which I thought was the Sharktown. This was lead matter. We then struck spurs of ore. It was about 10 feet through the ore, which dipped east 50°. We passed through this into lime. The granite on the north side extended a little below the 60-foot level. The air-shaft runs in surface soil 4 feet, then soft granite for 20 feet. We found ore in the granite running east and west. Granite was on the south and lime on the north side. The lime went down 10 or 12 feet below the sixty-foot level on the north side. From the main shaft we went east on the 120-foot level through lime 35 or 40 feet, then manganise for 18 or 20 feet, and then lime for 30 feet. The 120-foot level runs through the manganise and strikes clay at the end of the level on the left side. In the 120-foot level there was pay ore running east and west the whole length of the level from 6 inches to a foot in width. The pay streak was nearly vertical. In the sixty-
277 foot level it was stoped out. The map (Ringling's) represents the stopes. The tunnel level was commenced in April, 1879. The 120-foot level was run prior to August 9, 1879. The Salmon incline is run in manganise; so are the levels. In the incline the ore was in a stratum running east, and 15 feet below the 54-foot level was a streak in the north end of the incline running east and west. At the bottom of the incline this streak was about three inches wide. There was ore in the bottom cross-cut. In the 72-foot cross-cut they cut across a streak of ore in limestone, and on the other side of the shaft they struck ore in what we call the Sharktown. In the cut to the right of the shaft they struck granite. The ore in the 72-foot cross-cut was lying east and west and perpendicular. In the bottom cross-cut they leave the ore to the left. It is nearly perpendicular, running east and west. We have worked 500 or 600 tons of ore from the mine. I think we worked 109 tons in July and August.

"Who has worked the ground, all east of or from a perpendicular line projected from the turn-table, from July 1, 1879, to the
278 commencement of this action?"

Murray and I.

"Has Pardee worked that ground since July 1, 1879?"

No.

"Have Murray and Durfee continuously worked it since July 1, 1879?"

"Who are the only parties who have worked it since July, 1879?"

Myself and Murray; on the 17th day of August, while we were at dinner, Pardee and some parties broke into the mine and took possession of the tunnel level and bar-icaded it; they remained 6 hours and have not been in there since.

"Had you any conversation with Pardee in the fall of 1876, in reference to the location of the Scratchall and Sharktown leads?"

Yes.

Cross-examination:

The Scratchall discovery is about 700 feet west of the Salmon; I measured it between 500 and 700 feet; there is a cut near the Scratch-
all discovery a little west and adjoining the discovery; the
279 vein where engrossed runs easterly, a little north of east; the float was in boulders; I found it east and down the hill; I found some float ore all over the hill; the country rock is principally lime; the lime runs up the mountain, east, beyond the Salmon 100 or 200 feet before the solid granite commences; there is then at that point a contact; it does not show distinctly; the lime and granite is mixed mixed on the surface.

"How does it show in the excavation?"

"Between a point where it is all granite and a point where it is all lime, is there not a place where it is intermingled?"

I never sunk on it to see.

"It is not so in the excavations and the tunnel?"

The tunnel is in solid matter; the tunnel line crosses a streak of granite; the main shaft was always known as the Scratchall and never as the Sharktown; we commenced the shaft about June, 1876; the Salmon incline was not then started; there was a hole or two dug; it is now filled up or covered over.

Murray and Etheridge and I located the tunnel; the lime on the
north side of the shaft was black stained and white, and
280 stratified and running north. The lime was seamed, and it split. I saw no crystals or mica in it. At the Salmon incline I saw a lead crossing the Salmon croppings. On the east side of the discovery shaft the ore was perpendicular, and the same appeared like good, paying ore. I took a specimen. The vein — the Deitisheimer shaft ran into the ground on the west; it appeared to be pay ore. The Scratchall lead in the discovery hole showed 3 feet of ore. Another hole in which I found the lead is 3 x 4 feet and 5 or 6 feet deep; it showed a vein and small streak of ore. I next dug a hole across the ravine, 400 or 500 feet from the Deitisheimer. There was a former discovery on the Sharktown—the "Helena," I think. When I found it I believed it to be the Sharktown. From July 1, 1879, to August 9, 1879, we took out 109 tons—about 3 or 4 tons per day; some days we took out 6 or 8 tons. The walls of a vein should be country rock. Country rocks are the surrounding rocks.

"Are they the rocks which extend into the country?"

281 The hanging wall of the Scratchall varies; it is lime, manganese, and granite. The foot wall seems to be lime and manganese. I can't tell the distance of the contact of the lime and granite across the hill; they come together.

"Have you a general idea of where the contact is and its direction?"

Ans. Yes.

At the end of the tunnel level there was clay and lime mixed and no granite. I examined it this month. There is a bunch of ore there bearing a little south. It took 7 or 8 men nearly a week to put up what Pardee tore down. I have seen shoots extending lengthwise of the vein. I never saw seams more crosswise. At the Salmon discovery, in 1867 or 1868, I saw a little rock dipping east. A little east of the turn-table is a stope with a very pretty hanging wall on the south of the line. The seams in that ore run east and west. Near the hanging wall the ore had a grain east and west and inclining a little to the south. I saw no granite there.

Redirect examination:

The Sharktown discovery is north of the working shaft and about 20 feet east of the east line of the Salmon; it shows a vein
282 dipping east. In the Sharktown there is fair milling ore. I don't know how far down the Salmon vein extends.

Josiah M. Merrill was then sworn and examined an the part of the defendants and testified as follows:

I am acquainted with the Salmon mine. I examined it on May 23, 1879. I took samples from the north and south levels; I took samples from each side of them. I am a practical assayer. I took samples from 8 places in the Salmon and Murray and Durfee works at no place nearer than three feet from the Murray and Durfee vein except one from the crossing; this one showed silver, the others none. I assayed only for silver. (Here witness described the 8 places.) Here are the samples (producing them in bottles marked from 1 to 8).

"State whether you were acting in any other capacity than receiver in meddling with their works."

No.

Cross-examination:

These bottles contain the samples which I assayed. I assayed them only for silver. Oxide manganise has no commercial
283 value. I took the samples as they come without picking or selecting them. Brown did not help me. Brown said "Get an impartial selection," and I undertook to do so. The manganise close to the silver would show silver in the assay. I took samples of the manganise away from the ore. Brown instructed me to get samples away from any ore.

Charles M. Freeman was then sworn and examined on the part of the defendants and testified as follows:

I have seen the croppings of the Salmon mine and the Scratchall. I saw a stain of copper croppings running in the direction of the Murray and Durfee shaft, above it and about 40 feet west of it. I

saw croppings of the Scratchall west of the discovery. The tunnel starts in granite rather hard. Beyond the granite it crosses a black lead. Next is lime about 40 feet; then another lead; then lime again; then manganese; then lime again. Just before where the cut is the Scratchall is lime. The Scratchall is 7 or 8 feet
284 from the turn-table. There the ore runs east and west. In the levels the ore runs east and west and varying in width up to 4 feet and nearly perpendicular. In the Salmon discovery the ore appeared to be of low grade. The Salmon croppings are widest at the incline 25 or 30 feet, and away from it are narrower. They spread east and west at the incline.

Cross-examination:

The Salmon croppings stand up in one place about 4 feet. I saw croppings which seem to indicate another lead running east and west a little below the incline; veins that do not carry quartz I would not call leads. A fissure vein is one where the ore is continuous.

"What is a gost, rake, pipe vein?"

I never heard of them. The walls are dirt, earth, and rock.

Redirect examination:

I saw quartz taken out of the Deitesheimer shaft; it came from a depth of about 20 feet. I could see the strata; it was east and west.

John McGinley was then sworn and examined on the part of the defendants and testified as follows:

285 I worked in the 100 and in the 120 foot levels. There was ore there running east and west and lying perpendicular; there were pockets of ore in the winze; it started through manganese and ran through boulders of ore and lime.

"Did you find ore up and down the winze?"

Cross-examination:

When I saw ore run east and west I mean it was longest in that direction.

George W. Jones was then sworn and examined on the part of the defendants and testified as follows:

I am acquainted with the vein in which is the tunnel and the tunnel level. The country rock seams to be ore nearly north and south and to pitch east. I saw a pretty regular vein running east from the turn-table over 100 feet. I have been in the "Trout mine;" it is between 500 and 1,000 feet from the Murray & Durfee mine. The rock which prevails in the tunnel is lime. The tunnel cuts a vein of manganese. The lime is a brownish red with streaks of manganese; it is substantially all alike, only some is hard
286 and some is soft. I saw mineral quartz in one place in the tunnel. The ore in the tunnel level runs east and west and stands about perpendicular.

Cross-examination:

I mean the ore is longest east and west. I carried a light and kept my eyes open all the way through the level.

Philip Kane was then sworn and examined on the part of the defendants and testified as follows:

I have been a quartz miner 6 years. I have worked on the Trout and on the Scratchall mines. I ran the 120-foot level of Murray and Durfee, 27 feet on a band of ore between two line walls. The ore where I quit was four inches wide. I was in the Salmon incline. I saw a body of ore running east and west about 3 feet from the surface. In the main shaft I saw a vein of ore running east and west, as does every other vein in the camp. I also saw the ore running east and west in the shaft 400 or 500 feet east. I saw where the Cliff Extension shaft cut a vein running east and west. I have been to the Estell.

287 "State what you saw in reference to a lead running across the Salmon croppings at the Estell."

I saw a body of ore croppings on the Salmon, but there are shafts sunk for half a mile on each side showing a vein running east and west. I saw a north and south lead in the camp.

Cross-examination:

I worked three months on the main shaft. It runs through lime; the lime was not soft. It was hard enough to blast. I did not find any place where it gave way. There were some seams, such as I see in all country rock where I blast outside of the vein. The ore vein was 10 to 18 inches wide. I saw no clay or manganese lime come to within an inch of the ore on either side. There was no place where I sunk without blasting. The Salmon incline showed a lead two feet wide running east and west. On the south side was a black rock, in which was no pay. In the Scratchall discovery shaft was an east and west vein. It did not vary from an easterly and westerly direction. I was last there in 1878. Where they

288 made the cut through the mountain I saw the croppings east and west and showing a lead. A lead runs in country rock and carries mineral. By mineral I mean rock carrying gold and silver.

"What is the country rock south of the Salmon lead?"

I never knew there was a Salmon lead, nor said so. I know the Cliff Extension croppings. Croppings are sometimes an indication of a lead, but not always.

Redirect examination:

I never saw pay ore on the ridge except when the two leads cross. I never saw any indication of a lead north and south.

Thomas Ryan was then sworn and examined on the part of the defendants and testified as follows:

I have mined in Phillipsburg 5 or 6 years. I worked on the tun-

nel level for 70 feet east of the turn-table. On the level we struck blue shale and then lime. The ore extended as far as I worked, with lime on both sides. In one place the ore was in three seams, which came together where I quit work. The ore was on
289 the south side of the drift 14 inches wide; it dips a little north and goes westerly. I have examined the tunnel level to the end; the end is in a body of manganese in small veins of ore; the ore is nearly perpendicular. The appearance of the ore is the same as when I quit work.

"State what that ore running east and west is with reference to being a vein."

I believe it to be a vein. In the tunnel level I saw no evidence of either foot or hanging wall of a vein running north and south—vein crossing the tunnel level. All the lime in this level was blasting ground.

Here the witness described the formation in the tunnel level—the same as the former witnesses.

Exposure to air and water affect all rock. The surface was extended at the incline. I saw a vein running directly toward the incline 4 or 6 inches wide; the shaft was timbered. The ore looked as if it might run east and west. On the sixty-foot level I passed quartz as far as I could see. I saw a body of ore in the cross-cut at the bottom of the incline 8 inches wide and perpendicular.
290 The south drift was in lime; in the north drift was a little spur of ore. I did not see anything which I could call a wall of the Salmon in any of the works.

Cross-examination:

The ore in the tunnel level was a continuous vein; it carried its width in the bottom, but not in the sides and top; I saw no granite in my work; I think I saw some at the end of the tunnel level; it was in manganese and it was a piece of granite; I saw some seams of quartz at the place; the ore at first in the tunnel level lay against the shale, both dipping northeast; east of the shale the lime is light and stratified; I saw no crystals in it; I saw no granite elsewhere in the works.

Samuel Sprague was then sworn and examined on the part of the defendants and testified as follows:

I have mined 20 years in quartz; I am familiar with the Murray and Durfee works; I worked in them; the tunnel cross-cut a lead; the ore was east and west and extended 15 feet west of the turn-table; the tunnel is run in lime and there is lime on the east
291 side of the ore at 30 feet east of the turn-table; the ore run down 1 or 2 inches and then it widened; the ore was continuous the whole length of the tunnel level and stood perpendicular; the walls of the tunnel level are all lime—blasting rock; the tunnel runs through the granite into a ledge and then lime, the same as the country.

Witness here described the tunnel formation, the same as the other witnesses had done.

I found no wall of the Salmon mine in there.

"Is there any appearance of a hanging wall at the end of the tunnel level?"

I could not tell that, nor could any one else tell.

Plaintiff here moved to strike out the last clause of the last answer, which motion was sustained by the court.

I have examined all the levels and have found that the lead runs east and west; the sixty-foot level ends in ore, which is perpendicular; the ore is going east, and there could be no hanging wall on the east; the 100-foot level ended in ore with lime walls; there was ore at the end of the 120-foot level, east and west and perpen-
292 dicular; there is ore in Pardee's incline continuous from the Murray and Durfee works, running the same as the rest; there were croppings east of the Salmon incline; at the Estell the croppings run on both sides of the claim.

Cross-examination:

There are croppings there up over the mountain on the Silver Chief, which lies across the Estell. I can't say where the contact is; it is above the "Northwest Mill." The granite is east of the air-shaft. I never traced the contact except in the vicinity of Trout hill. I carried a candle and hammer in the tunnel and examined carefully. There was more water in the east part of the tunnel level than in the west.

Chris. Hart was then sworn and examined on the part of the defendants and testified as follows:

I have been a miner since 1868. I am acquainted with the property in controversy. In the tunnel I saw no foot wall of a north and south lead, nor on the tunnel level.

"State whether or not there is a lead running east and west in the tunnel level."

293 I saw a lead or body of ore in the tunnel level. I know what a shoot is. I saw no shoot crossing this lead.

Cross-examination:

Witness here described where he has worked in mines.

I have not examined to find the foot wall of the Salmon; a casing of talc generally runs along a foot wall; there is no talc here.

Hugh T. Murray was then sworn and examined on the part of the defendants, and testified as follows:

I am one of the defendants. I am acquainted with the Salmon, Scratchall, and Sharktown. Durfee and I sunk the main shaft; we started in 1877 or 1878. At 18 inches we struck ore running east and west; there was granite in the south end, and in the north it looked like lime. At 18 feet we struck a bed of manganese, what we

call the Sharktown; the same body of ore went to the bottom of the shaft. Where we struck the ore the lime went out and manganese came in. Past this manganese we had lime on the north and granite on the south. The granite went out at the 60-foot level; we
294 started the tunnel August 11, 1874. Two years ago in June we stoped out the 60-foot level. The discovery shaft of the Sharktown is 45 or 50 feet north of the Scratchall shaft and 20 feet east from the Salmon patent, and is 8 or 12 feet deep; the Sharktown is parallel to the Salmon on the east side of it. We found some quartz on Sharktown discovery. The level was running northerly and southerly, and dipped east 60°.

It was 12 or 14 inches wide.

Witness here described the formation in the tunnel, the same as had the other witnesses for the defense.

At the turn-table we struck the Scratchall vein. Across it we came to a bluish lime and slate mixed. There is a nice body of ore at the turn-table. This body continued to the end of the tunnel level easterly and westerly and nearly perpendicular. A plumb from the top of the shaft to the bottom of the same would be in the ore at the top and the bottom. I have been quartz mining since 1867. This is the Scratchall vein; if I have ever seen a vein this is one. There is no difference in the formation on either
295 side of the seam which Pardee calls the foot wall of the Salmon. East of the Salmon incline there were croppings easterly and westerly, and plainly showed a vein east and west. At every place where we worked on this vein east and west we found ore.

Here the witness described places along the vein where he dug and found the vein.

In the shaft I plainly saw the vein east and west; in the Deitesheimer shaft, the same. In a shaft 15 feet west of the incline the ore is the same. East of the Salmon we found, east and west, ore wherever we sank. The Scratchall location extends east of the Salmon line 120 feet. The width of the location is 312 feet.

Cross-examination:

I examined the Cliff Extension No. 2 shaft. There was a body of ore in it running east and west. On the north and south sides there was lime, pure white, hard mineralized lime. The lime went to the bottom of the incline. I know quartz when I see it. The map is correct. The shale is a mixture of lime and slate. The shaft
296 we call the Scratchall shaft. We so called it in the mortgage to Schnepel and in our transaction with Pardee.

(The witness was here handed some papers.)

I wrote them. Sharktown was this shaft north. I call a body of ore longer in one direction a lode if you can dig it out. In June, 1874, I looked down the Deitesheimer shaft; I could see 20 feet or more; I saw the vein plainly; it was perpendicular and 10 or 14 inches wide,

and dipped a little south. I did not then locate it because I was employed by a company and bound not to locate for myself. Durfee and I took 10 or 15 tons of ore out of the Scratchall discovery. It was in the shape of a vein.

"When did you first know you had come to the Samon mine?"

When I went into the incline of the Salmon last fall they had broken into our works.

(Here a paper was handed to the witness.)

I received this notice dated July 5, 1878. The tunnel was then in ⅔ of the distance. Beyond the turn-table was a little vein of granite 2 or 3 feet dipping east and running parallel to the shale,
297 mixed with shale, and rotten. I saw no granite like this on the 72-foot cross-cut.

Redirect examination:

I never knew anything about coming to the Salmon vein or bed; the first knowledge I had was when I went into the incline last fall.

Henry Schnepel was then sworn and examined on the part of the defendants and testified as follows:

I am a defendant in this suit. I have seen the Salmon and know the Scratchall. I saw the shaft in the Salmon ground 20 feet west of the incline; there was a quartz lead in it visible on the east and west sides; I was down the incline with Pardee on Sunday; he showed me the works. Pardee said he would like to avoid trouble, and claimed all the lead matter east—black, brown, and red.

Cross-examination:

I never said in the "Scott House" last Sunday that it was only one lead—all Salmon or all Scratchall. I said it was only the Scratchall there.

Thomas Whitesides was then sworn and examined on the part of the defendants and testified as follows:

298 I live in Phillipsburg. I have been a miner 30 years. I am acquainted with the ground in dispute. I have examined the works of Pardee and the works of Murray and Durfee.

The witness here described the formation in the tunnel, as did previous witnesses.

I should say the quartz in the tunnel level was a vein; it runs lengthwise of the tunnel. From the turn-table to the chute I saw no foot wall of a vein. This level ends in manganese with a lead running across it. I saw no hanging wall. I traced the vein of ore from the Murray and Durfee shaft up through the incline. The ore is east and west.

Cross-examination:

The witness here described places where he has mined in California & Nevada & Montana.

Charles Clark was then sworn and examined on the part of the defendants and testified as follows:

I am, and since April 1, 1879, have been, superintendent of the Hope Mining Company at Phillipsburg. I have given mining careful study for twelve years, and especially the last year and a
299 half. I have been on the ground and in the works of the premises in controversy.

The witness here described the formation in the tunnel the same as the preceding witnesses.

In the tunnel level is a vein easily traced for the whole length. It varies in width, runs east and west, and is between lime walls. I examined all the stopes in the tunnel level; the walls are well defined on the north and south sides. I found granite sand at the top of the winze. I passed through only one quartz lead in the tunnel, which runs about as the Scratchall would run. This vein—marked Salmon on the map—is manganise; there is a manganise bed next to the granite in the tunnel. In the tunnel between the dark strata is metamorphic lime crystal-ized.

"State what the formation is between the 1st and 2nd streaks of manganise, in reference to vein matter."

It is metamorphic lime and one of the series forming the hill. The country rock in the vicinity is metamorphic lime and manganise and bears no resemblance to vein matter. A vein is a
300 fissure or aggregation of metaliferous matter found in the country rock. The Scratchall is a fissure vein cutting the formation at about a right angle, striking through the granite, and cutting the Sharktown and Salmon.

I have examined all the workings carefully and all the strata, and there is nothing to indicate a north and south vein. In the tunnel level is undoubtedly an east and west vein cutting the stratification. There is nothing in the tunnel level to indicate a north and south vein. The strata runs north and south, but they are a part of the country formation, which extends west 1,000 feet that I know of.

The witness in his examination exhibited samples from the points to which he referred.

I found well-defined walls on either side of the stopes in the 120-foot level. I examined the cross-cut back to the bottom of the incline. In the level is a small vein of ore 6 or 8 inches. It was cutting the formation easterly and westerly. I traced that ore along the roof till it struck the incline in the floor and went out to the right. It was lying east and west and standing in the roof.
301 I then followed it up until I was lost in the north wall.

Pardee's drifts around the shaft cut a bed of decomposed lime and sand and a wedge of granite sand. In the south drift

from the 54-foot cross-cut there is no ore development; there is mixed through the manganese a crystal-ized lime. In the north drift there is a vein of ore which crosses the work easterly and westerly and was a continuation of the ore below.

A vein is an aggregation of mineral in a fissure. A bed is a part of the bed system of the country formation, as limestone bedding. I understand the elementary principles of geology. I have studied sufficiently to give an opinion as to beds and veins. My opinion is that this formation is bedded strata—alternating lime and manganese beds. Beds are laid down after the underlying formation, and prior to the overlying. Each stratum marks a period of deposit. This system of bedding of lime and manganese extends west several thousand feet. A contact vein is one between two distinct formations; there is no contact here because the formation is not primi-
302 tive. The overlying granite is a wash. It would not necessarily follow that there is a vein at the point of contact of the two formations from the fact that these beds were formed prior to the contact—the upheaval.

Cross-examination:

This is not primitive granite—it is secondary. Secondary granite is that which has been decomposed and is not in place. Granite is quartz, mica, and feldspar. It is a primary and elementary property of the earth. The granite here is a deposit; I cannot tell where it comes from. I have read no books on paleontology (11 *Adacoc ov la dox os*).

"Have you ever read the history of the Eureka Consolidated, as given in the testimony of Mr. Raymond and recited by Judge Field in his opinion in the Eureka case?"

Defendants object to the question. The objection is overruled by the courtand, the defendants except to the ruling.

"Name the three greatest historical mines in the United States." Comstock, Raymond, Erly. I don't know that I can classify
303 them; don't know that I can name the five which have produced the largest amount of bullion. A vein is made — 1st the fissure, then the filling. I don't know that there is any standard length of fissures which ultimate in veins; they vary in width from a knife-blade to 100's of feet.

"What historically is the greatest width of the Comstock?"

I have seen it stated as high as 300 & 600 feet. The witness has heretofore stated that he knew nothing of the Comstock except from reading.

"In what scientific works have you read that the greatest width of the Comstock is 600 feet? Do you know the three reports of Mr. Raymond in which he has discoursed most on the Comstock and given its geological formation and topography?"

I have not been able to read all the works of Mr. Raymond.

"In which one of Mr. Raymond's works which you have read does he give the most complete description of the Comstock?"

I have read some in which he gives a complete history of the Comstock.

304 The former question repeated.

In none of them which I have been able to get possession of.

"Have you never read by Rossiter W. Raymond a history of the Comstock mine?"

I never have.

Here followed a discussion of qualifications of a professional miner.

Shoots run with the vein and not across it. Carbonate of lime is not the most frequent gangue in the veins.

"What is carbonate of lime?"

I am not a chemist.

"What is lime; what is the Latin word for lime?"

There is probably some silica in the lime formation. I observed what has the appearance of silica.

"Is silica a component part of limestone in its primitive condition?"

Some lime carries a percentage of silica. I suppose silica is held in solution and deposited with the lime.

"Is silica insoluble in water?"

It is; it is held in suspension.

305 "What is the specific gravity of silica as compared with that of carbonate of lime?"

The object of this evidence is to show that the witness is mistaken in his theory.

I don't know the elements of blue shale. There is no native manganise; it is a metal, not a native metal.

"It is a foreign metal; and, if so, from what country?"

I mean it is not found by itself as a pure metal. This is what is called black oxide of manganise.

"How is pure manganise obtained?"

I don't know the process.

"What produces a metamorphosis of any portion of the earth's surface in respect to changing its mineral composition?"

Heat.

"Coming through the fissures?"

Not necessarily.

"Is there any author whom you have ever read who states that the internal heat of the earth changes the combinations of minerals in any other method except through the fissures in its crust?"

I can't now cite you to any author.

"Do you know?"

306 I do not. There is no evidence of a fissure next to the granite. The oxide was held in solution probably as a carbonate of manganise, and losing its carbonic acid it becomes an oxide. The strike of all the veins in that camp is east and west.

"Have you not taken an intense interest in this suit?"

I have taken a considerable interest to ascertain the formation

and character of the mine that I might testify intelligently, well knowing that future developments would show whether I and others were correct as to the nature of the formation of this mine.

Adjourned until 9 o'clock a. m., June 2, 1880.

JUNE 2, 1880, 9 a. m.—9th day.

Clarke's examination continued:

There are no indications in the tunnel level of a north and south fissure vein. The map is right. There are indications nowhere else of a north and south vein.

"Do not the croppings for 300 feet indicate a north and south vein?"

307 The croppings of that bed extend north and south. Beds have croppings when tilted. A bed is an aggregation of mineral formed along and parallel to the strata. Beds are surface deposit without overhanging strata or walls.

"Who gives that definition of a bed?"

Van Cotta and Le Compte.

"Does not Van Cotta say that bedded veins may exist in the earth at an angle of 90° as well as horizontally?"

Witness was here shown papers.

I made that affidavit and outlined the diagram. The Scratchall vein matter is quartz ore, almost entirely, and some lime. From working on the Cliff and Lady Byron I am enabled to say that the formation extends *a* 1,000 feet west.

"Does not that manganise vein at the Cliff run east and west?"

I think not. I don't know that the Lady Byron excavations show the manganise bed north and south, for the excavations are in an east and west vein. The 35-foot shaft on the Lady Byron discloses a north and south manganise vein. In the 10-foot
308 shaft a manganise bed is traceable. It is in some places 10 feet wide. At a point south it is traceable by croppings, which do not resemble the Salmon. The country is here denuded by washing away of the soil. There are no indications of manganise further west. There is some marble on the hill; some call it dolomite. I have not seen it between the Cliff and Lady Byron. I don't think I have seen it east of where "Poor Man's Gulch" comes down. Dolomite is crystallized lime, perhaps manganise lime. The rock from the contact next to the granite in the tunnel is decomposed granite and lime, and not dry talc. There is iron in it. It is not talc clay.

"Is not lime appropriate vein matter?"

Not in my view.

Redirect examination:

Manganise is not a mineral-bearing ore; it is simply a part of the formation.

The Salmon mine is manganise.

Recross-examination:

Manganise sometimes carries precious metals, but not in this district.

309 Lawrence A. Brown was then sworn and examined on the part of the defendants and testified as follows:

I commenced quartz mining in 1857 in Mariposa county, California; from then until now I have been engaged in it. I have been frequently up to examine mines. I don't claim to be a geologist further than I have applied it to the vein systems which I have examined. I have not studied geological chemistry; the character of the vein matter is determined much by the character of the country rock; so it is necessary to study the formation in which the vein is located. Veins are found in groups. I have examined the premises in controversy; as I have indicated, I made three or four examinations; November 20, 1879, was the first time. I examined the whole tunnel with a light and a hammer.

Witness here minutely described the secretive beds of lime and manganise in the tunnel, the same as the former witnesses.

Entering the drift by the turn-table we found the first quartz, which seemed to carry mineral. In this streak was a streak of calcita, which appeared like quartz. This quartz was on both
310 sides of the drift. It contained considerable galena. It shows that it has been under water, and — none of the effects of the alternate action of air and water. Going east on the tunnel level we encountered the same lime which we did on the tunnel, and running in the same direction. The blue streak was the same as in the tunnel. These beds of lime vary in composition and color. The walls of the vein in the tunnel level I found to be strata of lime, which had been rent and filled in with vein matter. There is a vein exposed from the west side of the tunnel easterly for 160 or 170 feet in the tunnel level. In the raise at the turn-table the ore is of the same character as that cut by the tunnel level. In the extreme west end of the raise is a body of ore resembling the body of ore cut by the tunnel at the turn-table, and running east and west. That body of ore extended on the south side of the raise 12 or 15 feet. It shades off from galena and becomes cupriferous. In the next raise the body of ore is 20 feet from the former one. The ore channel runs easterly and westerly. In the second raise
311 it is continuous for the whole length. In the 3rd raise the vein is full and runs to the east. The tunnel level, after passing a bed of manganise and lime, ended in another manganise bed. The vein stands straight and runs into the manganise. There were pieces of lime there. The vein here stands perpendicular, as it does all the way. The ore here was in an offshoot from the main fissure.

"State what evidence there is, if any, of the vein continuing beyond the end of the tunnel level."

The appearances are that the vein extends east and west, perpen-

dicular, through these works, and stands up and down in the end of the tunnel level. The east side of the air-shaft, as near as I could judge, was near the line of granite sand, where it had ceased its connection with the lime. The overlying granite came near to the contact with the lime at that point. The east end of the 60-foot level is in the vein. I found a fine body of ore 2 or 3 feet wide. On the 120-foot level the ore ran along, coursing east and west. The drift west of the bottom of the shaft is filled in. I took some of the waste and found ore a foot wide, running west and standing perpendicular.

312 At the east end it is taken out by a raise. The vein was the same as at the west end. The level terminates in ore standing just the same as in the tunnel level. The wall rock is alternate beds of lime and manganese. I found an ore vein on the west side of the main shaft; on the east side was ore of a similar width and character; it was running easterly and westerly; on the top of the Salmon ore croppings running north and south. In the north drift, from the 54-foot level of the Salmon incline, I found a body of ore. I went into the 72-foot cross-cut. I here saw some granite, a boulder, or a deposit from granite washings. When we got to the town I told Pardee that I thought a vein crossed the formation. He said that it appeared, or he thought, or there was a vein across there, but that he thought it did not affect his rights. I descended the main shaft; went through the lowest cross-cut in the Salmon incline. The material was the Salmon manganese vein. I found ore on the east side of the shaft and running east and west,

313 and ore of similar character in the cross-cut also running east and west through the Salmon vein and coming out into the incline; was near the center of the cross-cut. The incline at the bottom was in the Salmon west, country or foot wall of the Salmon.

At 20 feet from the bottom of the incline on the north side is a body of ore coming in and crossing the lower part of the incline; its strike is in the direction of the body of ore coming in from the Scratchall. Above this the ore body from the east passes out of the incline into the north side. I went up the incline to see if I could intersect this body; went into the 72-foot cross-cut. The ore body here stands perpendicular, and runs east and west, just as below. At the 54-foot cross-cut in the drift I encountered a body of ore coming from the west side, crossing the drift, and going out on the east; it was east and west and perpendicular. In the east cut from the north drift the ore is on the right side, and the fissure is 2 or 3 feet wide. I found no ore in the south drift. I now retraced my steps and verified all my observations. I now went to the surface

314 at the incline. The cross-fissures of ore I traced from the east part of the north side of the incline; it comes from the east up the hill and enters the incline on the north side. It is traceable east and west down the hill, and it is not again exposed until it gets into the 54-foot cross-cut. On Sunday I again went back to the mine, and went over my work. The dip of all the stratification in that neighborhood is east about 40° to 42°.

"State how, in your opinion, the vein in the Salmon incline runs on the north side of the incline at the points where the excavations have not exposed it."

The vein in the incline is seen about 20 feet on the north side; I am of the opinion that the ore continued between the point on the croppings, near the top of the incline, and the point of intersection of the vein by the north drift at the 54-foot level is one vein; taking the position of the ore on the east side of the north drift of the 54-foot level standing nearly perpendicular and pointing east, and the point where the vein is cut in the left-hand drift in the 72-
315 foot level standing perpendicular and pointing west, I am of the opinion that the vein continues between those two points; taking the position of the ore as shown in the 72-foot cross-cut standing nearly perpendicular, and the ore in the north side of the incline 20 feet above the bottom cross-cut, I am of the opinion that it is the same body of ore extending from the incline into the cross-cut; taking the position where the ore enters the north side of the incline standing perpendicular and pointing east, and the ore in the top of the bottom cross-cut standing perpendicular and pointing west, I am of the opinion that it is one and the same ore; taking the position of the ore at the top of the bottom cross-cut standing perpendicular and pointing east, and the ore at the east end of the cross-cut, near the Scratchall shaft, pointing west, I am of the opinion that it is one and the same body of ore; the bottom of the Salmon incline ends in the west bedding of the Salmon bed; we pass through the Salmon bed and get into the overlying limestone of the Salmon bed; in the sense of a foot wall or hanging wall I did not discover any.

316 U. B. Ringling was then recalled, cross-examined, and testified as follows:

I made two affidavits in this case and two surveys—one of the surface ground and one of the workings. There was one point I could not determine; the Government surveys have jugged it around.

The maps prepared by the witness were here produced and shown.

Sanders, the attorney for the plaintiff, stated that the object of introducing this testimony was to qualify, in any respect which it may differ therefrom, the authenticity and correctness of the map before introduced in evidence by the defendants. When I made those maps I considered them correct. The angles on the last map are averages from all the measurements of angles in the tunnel. The irregularities are not all put down. I could not see into the ground.

"Is that a correct representation of the end of the tunnel level?"

It was not measured.

"What is the variation between that point of the winze and the tunnel level?"

317 If the lines in the first map were projected they would not run in the same direction as in the last map.

Here the witness explained various marks and lines on the maps.

These maps were made in great haste. I had to curtail my survey to get the maps off in time.

L. R. Brown's examination resumed:

I saw the samples taken from the works from which Dr. Merrill made his assays.

"Here the witness described the 8 places from which they were taken as marked on Dr. Merrill's duplicates.

There is a distinction between beds and veins. Beds are formed upon a formation younger than the one in which they are laid down and older than the one which is upon them—one on top of the other in point of time; they may be of lime, slate, or schist, and they are sedementary and laid down horizontally.

Mechanical forces tilt the beds on the line of force. Here,
318 then, is a granite range running north and south which has broken through these beds. These beds incline towards the granite at about 45°. I regard this formation a zone of beds lying from the Salmon incline to the granite. Eastward is a granite bed several hundred feet higher than these beds. The beds were laid down horizontally, and the line of force breaking through them was north and south. I testify from my investigations on the ground. The line of force was parallel to the breakage of the beds. The beds broke and settled back against the granite. The granite being higher it fell back to some extent. The situation here is not the natural one. The granite washed down by erosion and decomposition. The probability is that the manganese beds do not extend down any great depth; they extend to the granite and there cease. Veins are fissures in the earth's surface, filled with minerals. The walls of a vein are composed of the rock through —. If the fissure went across a strata of lime the walls of the vein would be the lime abutting upon the vein. A contact vein is between two dis-
319 tinct formations. The so-called Salmon is not a contact mine; there could be no contact in that position; if there could be one it would be where the granite meets the lime bedding.

Cross-examination:

"Does the term 'bedded vein,' as you use it, come within the sense in which mineral, subject to exploration and entry, is used in the mineral laws of the United States?"

"Does it, in your view, make any difference in what form the mineral exists in the vein?"

I don't know that I can answer.

The defendants here move to strike out all of the witness'*es* testimony as to whether in his opinion this formation is a vein or bed.

By the COURT: "The motion is sustained as far as the witness' opinion assumes to define the meaning of these terms as used in the acts of Congress."

"Are beds lodes?"

I do not so understand them. I don't remember the date when I was first engaged in this suit. There was no stipulation as to
320 my compensation. I have received $173.00. I was employed by Mr. Robinson.

"What works on geology have you read?"

I have studied nature, Dana and Le Cone—Dana principally. I saw croppings on the surface. There is no rule as to straight veins being in contacts or out. I am a civil engineer, a graduate of a military school in the city of Charleston, South Carolina. Gold is not a composite. I can't account for the granite by the turn-table. Where two formations are *straited*, showing dynamic force, it is evidence of a fissure. I saw no evidences of granite in any of the levels. The Scratchall fissure was made after the deposition of the strata. Lime is not vein matter. Metamorphic lime is vein matter when it occurs with the ore in the fissure parallel to the bedding. Spurs are filled at the same time with the main vein. The specimens produced here are avarage ones. The Salmon is not a contact vein. I saw croppings of the Scratchall on the surface. A streak can run clear across the vein as well as across the croppings.

Redirect examination:

321 On each side of the clay seam in the tunnel there was lime. It is a seam of decomposed lime.

The defendants here offered in evidence the complaint in case No. 1399 in this court for the purpose of establishing the fact that the defendants were in possession of the *locus in quo* upon which the alleged trespass was committed, and at the time the alleged trespass was committed, to show adverse possession of the mine when the trespass was alleged to be committed.

Objected to. Objection sustained.

Defendants move to strike out all of the plaintiff's evidence in regard to plaintiff's going into possession.

The said motion was overruled by the court and the defendants at the time duly excepted.

Hugh T. Murray was then recalled and questions put to him, which questions are contained in bill of exceptions No. —.

Defendants here rested.

In rebuttal the said plaintiff recalls James W. Estell:

322 "What do you know, if anything, of there being a crossing vein at the Salmon incline?"

I know nothing which indicates a cross-lead there. There is a streak there within 4 or 5 feet on the west of the croppings. It shows different stains from the other croppings. There are no croppings which indicate a cross-lead. There is no evidence of a cross-lead in the incline; on the west side of the incline there were no evidences. In the Deitesheimer there is a streak down about 15 or 16 feet; it ran into the sand; there was none below the 16 feet.

"How many excavations are there in the Lady Byron?"

I know of one on the Lady Byron, No. 1, west of the discovery. The manganise here is east and west.

Defendants object to evidence as to the manganise, as the witness has not been shown to be an expert.

"At the discovery on the Lady Byron have you made an examination which enables you to say whether there is a north and south lead of manganise?"

I have seen no indication of any such thing.

Cross-examination:

I saw a little streak 8 or 10 inches wide in the Deitesheimer.
323 It disappears in the west side first. The Deitesheimer was sunk for a prospect. Probably it was sunk to prospect an east and west lead. I don't know whether the tunnel cuts a north and south bed of manganise. All the holes show maganise. I don't know positively that there is no east and west vein at the Salmon incline. The excavation don't determine that there is a cross-lead. No one can deny that there is a cross-streak.

Hector Horton recalled:

"Did you examine the surface of the ground at a point of crossing the Salmon incline, running east and west, if there be a crossing lode?"

Yes. I sunk the Deitesheimer shaft in 1868. There was a small vein in the east end of 11 or 12 inches; at the west end it ran out; at the east end it ran out. I have never seen any surface indications of a cross-lead except a little seam.

Cross-examination:

I looked down the Murray and Durfee, west of the Deitesheimer,
and saw no sign of a vein I saw no quartz in it. I sunk
324 the shaft looking for a cross-lead. I worked on the Cordova, Cliff, Lady Byron, Bob, Benn, Squeakson, and Simon Luggs and found no north and south manganise beds.

Harvey Showers recalled:

There is a streak running across by the Salmon incline 7 or 8 inches wide. It is in the Salmon croppings; a colored streak. I looked for east and west croppings and found none. I saw nothing of an east and west crossing lead. I examined for one.

H. K. Philips recalled:

"Have you or have you not examined the surface ground at or in the vicinity of the Salmon incline with a view to determine whether or not there are any evidences of a lead crossing the Salmon?"

Yes. I found indications of a shoot—a small stratum; a dark streak, diagonally or straight angles. It was in the Salmon croppings.

Cross-examination:

There was no ore in the west shaft.

325 George B. Foot recalled in rebuttal:

I examined the Scratchall discovery and a cut to the west. There was a vein there. A line drawn through those two points and projected would indicate the line of the Scratchall as crossing the Cliff Extension — feet south of the incline, and south of the Algonquin road.

Cross-examination:

A few feet or inches difference in the two points would throw the line far out of plumb on the Cliff Extension.

James K. Pardee recalled:

I have examined east up the hill and west to the Trout Hill, and there is no evidence of an east and west vein.

"Describe the Scratchall discovery and the accompanying excavations."

The discovery shaft is 26 or 27 feet deep; west of that is an open cut. These cuts expose a vein for more than 20 feet. The line projected as Foot testified would strike as Foote said. Near the Salmon west line is a cut 16 feet deep. I have never been able
326 to see a vein there. I have never seen an east and west crossing the Salmon. I have seen a streak. The developments in the north level from the 54-foot cross-cut show no east and west vein. All the ore there runs north and south.

"How wide was the ore in that level?"

Four or five feet; i- one place 8 or 10 feet; in the Murray and Durfee excavations the ore varies from nothing up to 3 or 4 feet; there is no sign of a wall rock there; I never saw anything east and west except this streak; none of the ore found in this north level is the same as found in the streak in the lower Murray and Durfee working.

Evidence closed.

9 o'clock A. M., *June* 4, 1880—11th day.

The plaintiff desires to have withdrawn from the jury all the evidence of trespasses upon the property in question prior to August 9, 1879.

J. C. ROBINSON,
CHUMASERO & CHADWICK, and
E. W. TOOLE,
Att'ys for Defendants.

327 *Stipulation.*

It is hereby agreed by and between the plaintiff and the defend-

ants that the foregoing statement on appeal is correct, and the same is hereby agreed to.

(Signed) J. C. ROBINSON,
Of Counsel for Defendants.
HIRAM KNOWLES,
Attorney for Plaintiff.

Dated Nov. 30, 1880.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY, JAMES E. DURFEE, HENRY SCHNEPEL, and JOSIAH M. MERRILL, Defendants.

This cause having, so far as damages claimed for the trespass at law, been tried in the presence of the judge *to* a jury, and the jury having rendered a general verdict in favor of the plaintiff and against the said defendants, which said general verdict is in the words and figures following—that is to say:

328 JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY, JAMES E. DURFEE, HENRY SCHNEPEL, and JOSIAH M. MERRILL, Defendants.

"We, the jury in the above-entitled cause, do find in favor of the said plaintiff and against the above-named defendants, and we assess his damages at the sum of $1.00.

"(Signed) ADDISON SMITH, *Foreman.*"

Deer Lodge City, June 5, 1880.

And whereas, on motion of said defendants, certain special issues were submitted to the jury and answered, which, with the answers of the jury, were as follows, viz:

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY *et al.*, Defendants.

The jury will answer all of the following questions:

1st. "Does the Salmon vein extend down as far as the lower or tunnel level of the defendants?"

Answer Yes.

329 2nd. "If your answer to the above be no, then answer how far down does it extend?"

Answer. ———

3rd. "If your answer to the first question be yes, then answer how wide is said Salmon vein where the defendants' lower or tunnel level runs east?"

Answer. From big talc seam east of the tunnel turn-table to the granite hanging wall.

4. "Is there such a vein as the Scratchall vein running east and west, as claimed by the defendants?"

Answer. "From the body of ore exposed westerly from the turn-table there may be a Scratchall or a vein connecting closely with a contact vein from the west."

5. "Designate where the foot wall and the hanging wall of the Salmon vein are in the lower or tunnel level and the 120, 100, and 60 foot level of the defendants, if you find that said Salmon vein extends down so far."

Answer. See paper marked "A" for answer.

6. Which of said parties, said plaintiff or the defendants, were in the actual possession of the premises when said defendants
330 extracted and took out ore in the months of July and August, 1879?

Answer. Plaintiff.

Exhibit "A," being answer to the 5th interrogatory:

The hanging wall of the Salmon mine in the tunnel level is the overhanging granite; the foot wall is in the large talc seam west of the Murray and Durfee air-shaft and between the first two angles of the tunnel level proceeding eastward from the turn-table, as shown by De Lacy's map, as appears to be shown by the blue and green clay seam west of the first angle from the granite wall. The foot wall is shown in the incline at the point where it first deflects easterly, the granite being the hanging wall. As to measurement the jury are not prepared to state the distance across the vein.

(Signed) ADDISON SMITH, *Foreman.*

Deer Lodge City, June 5, 1880.

And the said evidence having been given to the jury in the presence of the court, and the court being fully advised as to the facts in the case and the respective rights of the parties, on motion
331 of Messrs. Napton, Knowles, and Sanders, of counsel for the plaintiff, for the equitable relief prayed for by injunction, it is ordered that the said general verdict of the jury be approved, and that the answers of the jury to the special interrogatories be, and the same are hereby, confirmed and in all things approved; and the court finds the facts to be as set forth and found by said jury, so far as their findings cover the case. And the court finds that the said Salmon lode is bounded on its easterly side by the granite hanging wall lying to the east and at the contact east of the said surface ground thereof, and that the excavations, working, and extracting of ore by the defendants from August 9 to August 25, inclusive, was on those certain premises described in plaintiff's complaint, to wit: That piece or parcel of mining ground containing three and twenty-five one-hundredths acres, being known in the United States land office at Helena, Montana Territory, as mineral entry number one hundred and four, and numbered by the surveyor general of said Territory as lot number thirty-eight, situated in township seven north, of range thirteen west, of
332 the — principal meridian, in the Flint Creek mining district, in the county of Deer Lodge, Montana Territory, and bounded

as follows, to wit: Commencing at a limestone marked number one; thence north thirty-five degrees west six hundred feet to a limestone marked number two; thence north 55 degrees east one hundred and eighteen feet to a limestone marked No. three; thence south thirty-five degrees east six hundred feet to a granite marked number four; thence south thirty-five degrees east six hundred feet to a granite marked number five; thence south fifty-five degrees west one hundred and eighteen feet to a granite marked number six; thence north thirty-five degrees west six hundred feet to the place of beginning.

And the said Salmon vein situated in the above-named premises dips, in its downward course, to the east at an angle of about forty-five degrees, and is enclosed by clearly-defined boundaries, and has to the east a hanging wall of granite and extends to the same and to the west to a strata or seam of blue shale; and that
333 the defendants, on the 25th day of August, 1879, did and do yet threaten to continue to trespass thereon and extract ore therefrom and destroy the substance of the said estate, and that the said Salmon lode was from the 9th to the 25th day of August, 1879, in the possession of the plaintiff, and that since that date he has become the owner thereof and is now such owner, and that said lode in its downward course dips easterly at an angle of about forty-five degrees, and in that direction abuts against and is bounded by the granite hanging wall, and that it extends westerly as far as that certain blue streak of shale mentioned in the special findings of the court and therein described, and about one hundred and thirty feet westerly from said granite hanging wall and parallel therewith, and that the strike of said Salmon lode is nearly north and south; and the court being of the opinion that the plaintiff is entitled to the equitable relief prayed, and that the equities are with him, it is ordered, adjudged, and decreed that the said defendants and each of them, to wit: Hugh T. Murray, James E. Durfee, Henry
334 Schnepel, and Josiah M. Merril, and their servants and employes, and the servants and employes of each of them, be, and they hereby are, enjoined and restrained from making any entry upon or extracting any ore from the premises known as the Salmon lode, as above herein described and set forth, either on its surface ground or as it inclines or dips, or from any lodes which cross the same within the space of intersection of such cross-lodes, if such there be. It is further here considered by the court that the plaintiff, James K. Pardee, have and recover from and of the defendants, Hugh T. Murray, James E. Durfee, Hehry Schnepel, and Josiah M. Merrill, the *some* of one dollar ($1.00) damages and the further sum of $1,054.00, his costs in this behalf expended.

WM. J. GALBRAITH, *Judge.*

And afterwards, to wit, on the 3d day of August, A. D. 1880, the said defendants filed herein their notice of appeal to the supreme court of Montana Territory from the said judgment and decree herein, of which said notice of appeal the following is a copy, viz:

335 *Notice of Appeal.*

In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY, JAMES E. DURFEE, HENRY SCHNEPEL, and JOSIAH M. MERRILL, Defendants.

To Messrs. Hiram Knowles, W. F. Sanders, and Thomas L. Napton, att'ys for plaintiff:

You will take notice that the defendants appeal to the supreme court of said Territory of Montana from the judgment rendered in said cause on the 5th day of June, 1880, and the verdict therein. Said appeal with be taken and heard on a statement of said cause to be filed therein.

J. C. ROBINSON,
CHUMASERO & CHADWICK, AND
E. W. TOOLE,
Att'ys for Defendants.

TERRITORY OF MONTANA, }
County of Deer Lodge, } *ss:*

336 J. C. Robinson, being duly sworn, says on oath that he is of counsel for the said defendants within named, and that on the 5th day of June, 1880, he served the within and foregoing notice of appeal by placing a true copy thereof in an envelope directed to W. F. Sanders, Esq., one of the attorneys for the plaintiff, who resides and at said time resided and was in the city of Helena, Lewis and Clarke county, M. T., postage paid, and which said envelope so directed and postage paid affiant put in the post office at Deer Lodge city, *and* M. T., and that there is a United States mail route between said Deer Lodge and said Helena; that both of said other attorneys for the plaintiff, said Knowles and Napton, at said time and for as much as four weeks thereafter, were absent from said Territory, and their offices were locked up, so as to prevent any one entering the same.

(Signed) J. C. ROBINSON.

Subscribed and sworn to before me this 3rd day of August, A. D. 1880.

GEO. W. IRVIN (II), *Clerk,*
By A. S. HIGGINS, *Deputy Clerk.*

337 In the District Court, Second Judicial District, Deer Lodge County, Montana Territory.

JAMES K. PARDEE, Plaintiff,
vs.
HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, and HENRY SCHNEPEL, Defendants.

Whereas on the 5th day of June, 1880, said plaintiff recovered

judgment in said court for the sum of one dollar damages and the decree and judgment of said court enjoining said defendants from working and mining certain premises in said decree described, and as said defendants are desirous of appealing therefrom to the supreme court of said Territory:

Now, therefore, we, the undersigned, residents and freeholders of said county, undertake, in the sum of three hundred dollars, and promise to the effect that said appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof, not exceeding three hundred dollars.

Dated July 10, 1880.

338 MORITZ BIEN. [SEAL.]
PETER LANSING. [SEAL.]

TERRITORY OF MONTANA, *Deer Lodge County:*

Moritz Bien and Peter Lansing, being duly sworn, on oath, each for himself, says that he is a resident and freeholder of said county and is worth three hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

MORITZ BIEN.
PETER LANSING.

Subscribed and sworn to before me this 10th day of July, 1880.

J. C. ROBINSON,
Notary Public.

I hereby approve the within bond and the limits thereto, July 10, 1880.

GEO. W. IRVINE, *Clerk,*
By A. S. HIGGINS,
Dep'ty Clerk.

339 In the District Court of the Second Judicial District of the Territory of Montana and for the County of Deer Lodge.

JAMES K. PARDEE, Plaintiff,

vs.

HUGH T. MURRAY *et als.*, Defendants.

I, Geo. W. Irvine II, clerk of the above-named court, do hereby certify that the above and foregoing is a full, true, and correct transcript of the following papers in the above-entitled cause, as appears to me of record in said court, to wit: the complaint; separate answer of the defendants, Murray & Durfee; separate answer of defendants, Merrill and Schnepel; replication No. 1 and 2; supplemental complaint and answer thereto; assignment of errors; exceptions to the testimony at the trial; exceptions to the instructions; instructions of the plaintiff and defendants given; instructions of the defendants refused; statement on appeal; decree; notice and undertaking on appeal, and the certificate.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said district court this 1st day of December, A. D. 1880, at Deer Lodge City, M. T.

[SEAL.] GEO. W. IRVINE II, *Clerk.*

340 In the Supreme Court of Montana Territory. January Term, 1881.

JAMES K. PARDEE, Respondent,
vs.
HUGH T. MURRAY *et al.*, Appellants.

Be it remembered that in the present term of January, A. D. 1881, the above-entitled cause was brought into the supreme court of Montana Territory by virtue of an appeal from the judgment of the court below rendered therein, agreeably to the statute of said Territory and the rules of said court in such case made and provided, and the transcript of the record of the court below in said cause was duly filed and the cause docketed in said court.

And afterwards, to wit, at the January term, 1882, said cause came on to be heard before said supreme court on the said transcript of record and was argued by counsel, whereupon the court took the case under advisement.

And afterwards, to wit, on the 16th day of August, 1882, said cause came on for decision of the court on appeal, whereupon the court delivered the following opinion, viz:

341 *Opinion of the Court by Wade, Chief Justice.*

In the Supreme Court of Montana Territory. August Term, A. D. 1882.

JAMES K. PARDEE, Respondent,
vs.
HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, and HENRY SCHNEPEL, Appellants.

Appeal from second district, Deer Lodge county.

This controversy, as shown by the pleadings and testimony, arose over the identity of certain quartz lodes, the plaintiff claiming possession of the Salmon and Cliff Extension lode claims, situate near Phillipsburg, Deer Lodge county, he being the lessee of Holland and Estell, who purchased the claim in 1873, and after the commencement of this action received a Government patent therefor, and the defendants basing their right upon their location and possession of the Sharktown and Scratchall claims. The answer of the defendants
342 denies the possession of the plaintiffs, but the testimony conclusively shows, and without question or dispute, so far as the same appears in the transcript, that the plaintiff, at the time of the grievances complained of, was, and that for a long time prior thereto his lessors had been, in possession of the surface ground of the Salmon and Cliff lode claim. The answer also denies that the de-

fendants ever entered upon the Salmon & Cliff claim, or that they ever mined within the limits thereof, and avers that ever since the 9th day of February, 1875, they have been in possession of and working the Sharktown and Scratchall claims, and therefore alleges that plaintiff's action is barred by the statute of limitations of February 9, 1865, and of January 11, 1872.

The replication of the plaintiff admits the location of the Sharktown and Scratchall claims, but alleges that the defendants, since the 9th day of February, 1875, have been working on the Salmon and Cliff Extension. The location of the Sharktown and Scratchall claims were not in question. There was no controversy concerning them, and could have been none. Their location was ad-
343 mitted in the pleadings, and any testimony concerning such location was properly excluded from the evidence. This seems to be the state of facts in the case. The defendants entered upon their own grounds and outside the surface boundaries of the plaintiff's claim and sunk a perpendicular shaft and struck a vein of quartz beneath the surface, and the question at issue was whether this vein belonged to and formed a part of the Salmon and Cliff Extension lode, and upon this issue the jury found for the plaintiff, and that it did. Upon this issue, testimony as to when the defendants commenced work upon their claims or under what claim of title, or how much money they had expended thereon, or when they first commenced work, was wholly immaterial after the admission in the pleadings of the location of their claims, nor would it have been competent to have proved the declarations of Holland and Estell, the lessors of the plaintiff, as to the extent or limits of the Salmon and Cliff vein, providing the extent and limits of
344 the same at the time they may have made any declaration, because of want of development, were entirely unknown. Such declaration at such a time could have been nothing more than mere speculation and wholly incompetent for the purpose for which they were offered. Neither would the opinion of the respondent in 1876, as to the location of the Scratchall claim, or the opinion of any witness as to the dip or direction of the ore in any other vein, make any difference. The possession of the respondent was sufficient to maintain this action. He had possession of the surface ground, and such possession gave him possession of all veins, lodes, ledges, *and c.*, throughout their entire depth, the top or apex of which lies inside of the surface lines extended downwards vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the surface location.

U. S. Stats., sec. 2320.

Possession of the surface of a mining-claim location is the possession of all veins, lodes, and ledges the top or apex of which are inside the surface lines, although such veins, lodes, or ledges,
345 as they go downwards, may extend outside such surface lines, and possession of the surface ground protects such veins, lodes, and ledges from the operation of the statute of limitations.

Therefore before the defendants could set up any adverse claim to the Salmon and Cliff Extension vein they ought to have shown that they were in possession of the same at the surface. No adverse possession could become operative by going outside of its boundaries and sinking a shaft upon what they claimed as another location and striking the Salmon and Cliff Extension vein on its dip and outside of its surface lines, no matter how long continued, if unknown to the respondent and his lessors. In such a case the statute would begin to run only from the time it became known to the Salmon and Cliff owners, their predecessors or assignors, that the defendants had entered into the possession of the vein under ground and outside of its surface boundaries. Such owners would have no right to enter upon the defendants' ground or into their shaft or works, and, therefore, no means of knowing the extent of the defendants' possession or what titles they might be claiming by virtue thereof.

346 Adverse possession, in order to ripen into a title, must be open, notorious, and under a claim of right. The defendants set up no claim to the Salmon and Cliff Extension. They deny that they ever worked upon the same. They claim title by virtue of the Sharktown and the Scratchall locations, and allege that all their work was done upon such locations. They therefore can claim nothing by virtue of adverse possession of the Salmon and Cliff Extension. They declare that they held no such possession and claim no interest in that vein. Under these averments in their answer they can claim nothing by adverse possession. Their pleading must not be contradictory or inconsistent. Their testimony must not contradict their averments. After having denied in their answers that they ever had possession of the Salmon and Cliff Extension lode it was no error for the court to refuse to admit testimony in their behalf that they had taken forcible possession thereof.

If, under the state of circumstances disclosed in this case, the defendants might have availed themselves of the statute of limitations, they have not so pleaded the same as to become entitled to

347 the benefits thereof. They claim under the statutes of February, 1865, and January, 1872, which were repealed by the act of February 16, 1877.

The defendants also claim by virtue of a cross-vein.

All competent testimony on this issue seems to have been fairly submitted to the jury. In such a case priority of title governs, and the prior location is entitled to all the ore or mineral contained within the space of intersection, but the subsequent location has the right of way through the space of intersection for the purposes of the convenient working of the mine.

U. S. Stats. (revised), section 2336.

If a vein with a prior location crossed another such vein would not disturb the possession of the subsequent locator, except as to the extent of the cross-vein, and would entitle the prior locator to the ore and mineral contained in the space of intersection. If with a subsequent location the locator would be entitled only to a right of way to the extent of his cross-vein for the purpose of working his

mine, and to no other right, and if he should take the ore contained in the space of intersection, he would be a trespasser, against whom the prior locator in possession of the surface
348 ground might maintain an action for trespass.

The judgment is affirmed with costs.

D. S. WADE,
Chief Justice.
E. J. CONGER,
Asso. Justice.

Filed & entered Feb'y 2, 1882.

I. R. ALDEN, *Clerk.*

Thereupon judgment on appeal was entered in said cause, to wit:

In the Supreme Court of Montana Territory. January Term, 1882.

JAMES K. PARDEE, Respondent,
vs.
HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, & HENRY SCHNEPEL, Appellants.

Whereas in the present term of January, in the year of our
349 Lord one thousand eight hundred and eighty-two, the above-entitled cause came on to be heard before said — on the transcript of the record of the district court in said cause, which was brought into this supreme court by virtue of an appeal agreeably to the statute of said Territory and the rules of this court in such case made and provided, and was argued by counsel, whereupon it is now here ordered and adjudged by this court that the judgment and decree of said district court entered in said cause on the 5th day of June, A. D. 1880, be, and the same is hereby, affirmed with costs. And it is hereby further ordered by this court that said plaintiff and respondent, James K. Pardee, recover against said defendants and appellants, Hugh T. Murray, James E. Durfee, Josiah M. Merrill, and Henry Schnepel, — dollars for his costs herein expended, and have execution therefor.

2d of February, 1882.

And on the 12th day of October, 1882, said defendants filed herein the writ of error in words & figures following, to wit:

350 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of Montana Territory before you, or some of you, in cause between James K. Pardee, respondent, and Hugh T. Murray, James E. Durfee, Josiah M. Merrill, and Henry Schnepel, defendants and appellants, a manifest error hath happened, to the great damage of the said

Hugh T. Murray, James E. Durfee, Josiah M. Merrill, and Henry Schnepel, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do command you that, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October
351 next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of said Supreme Court, this 12th day of October, A. D. 1882.

ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed by—
DECIUS S. WADE,
Chief Justice.

And on the 14th day of October, A. D. 1882, said defendants and now plaintiffs in error filed herein their undertaking to accompany said writ of error, of which said undertaking, in words and figures, the following is a copy, to wit:

352 In the Supreme Court of the United States.

HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, and HENRY SCHNEPEL, Plaintiffs in Error,

vs.

JAMES K. PARDEE, Defendants in Error.

Know all men by these presents that we, Edwin W. Toole and Fred. Lehman, of Lewis and Clarke county, Montana Territory, as sureties, are held and firmly bound unto James K. Pardee, the above-named defendant in error, in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said James K. Pardee or to his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each and every of them, severally and jointly, firmly by these presents.

Sealed with our seals.

Dated this 14th day of October, A. D. 1882.

Whereas the above-named Hugh T. Murray, James E.
353 Durfee, Josiah M. Merrill, and Henry Schnepel have sued out a writ of error to remove the above-entitled cause from the supreme court of Montana Territory to the Supreme Court of the United States to reverse the judgment rendered in said cause by

the supreme court of Montana Territory on the 16th day of August, A. D. 1882, in favor of the said defendant in error and against said plaintiffs in error:

Now, therefore, the condition of the above obligation is that if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all damages and costs which may be awarded against them if they shall fail to make good their plea, then this obligation to be void; otherwise to be and remain in full force and virtue.

EDWIN W. TOOLE. [SEAL.]
FRED. LEHMAN. [SEAL.]

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

Edwin W. Toole and Fred. Lehman, the persons whose names are subscribed to the foregoing undertaking as sureties thereon,
354 being duly sworn, each for himself says that he is worth the amount specified in the above undertaking as the penalty thereof over and above his just debts and liabilities and property exempt from execution.

EDWIN W. TOOLE.
FRED. LEHMAN.

Subscribed and sworn to before me this 14th day of October, A. D. 1882.

[SEAL OF NOTARY.] WM. WALLACE, JR.
Notary Public.

The foregoing bond approved and supersedeas ordered.
(Signed) D. S. WADE,
Chief Justice.

And on the 12th day of October, 1882, the said plaintiffs in error filed herein their citation, of which in words and figures the following is a copy, viz:

355 UNITED STATES OF AMERICA, ss:

In Supreme Court.

HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, and HENRY SCHNEPEL, Plaintiffs in Error,
vs.
JAMES K. PARDEE, Def't in Error.

To James K. Pardee, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein Hugh T. Murray, James E. Durfee, Josiah M. Merrill, and Henry

Schnepel are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of the supreme court of Montana Territory, this twelfth day of October, in
356 the year A. D. 1882.

DECIUS S. WADE,
Chief Justice.

Endorsement: "Received a copy of the above citation this 14th day of October, 1882. Hiram Knowles, Sanders & Cullen, att'ys for defendant in error."

357 In the Supreme Court of Montana Territory.

HUGH T. MURRAY, JAMES E. DURFEE, JOSIAH M. MERRILL, & HENRY SCHNEPEL, Pl'ffs in Error,
vs.
JAMES K. PARDEE, Def't in Error.

I, I. R. Alden, clerk of said supreme court, do hereby certify that the foregoing three hundred and fifty-six pages, numbered from 1 to 356, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in said court in the above-entitled cause as the same appear on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 18th day of June, A. D. 1883.

[Seal Supreme Court, Montana Territory.]

I. R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 132. Hugh T. Murray, James E. Durfee, Josiah M. Merrill, and Henry Schneppel, plaintiffs in error, *vs.* James K. Pardee. Filed 10th October, 1883.

Dismissed
May 14. 1888

127-787

5

Supreme Court of the United States.

OCTOBER TERM, 1887.

ALLISON NAILOR, JR., et al., Appellants,
vs.
WASHINGTON T. NAILOR, et al., Appellees. } No. 862.

APPEAL FROM DECREE OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS THE APPEAL.

H. W. GARNETT,
Solicitor for Appellant.

C. C. COLE,
WM. A. COOK,
Solicitors for Appellees.

Law Reporter Print.

Supreme Court of the United States.

OCTOBER TERM, 1887.

ALLISON NAILOR, JR., ET AL., Appellants,
vs.
WASHINGTON T. NAILOR ET AL., Appellees. } No. 862.

Appeal from decreee of the Supreme Court of the District of Columbia.

Motion to Dismiss the Appeal.

And now come Washington T. Nailor, Rachel E. Trimble, and Frances M. Clark, the two last mentioned being married women, who sue by their next friend, Washington T. Nailor, by their solicitors, and move the court to dismiss the appeal in the above cause.

C. C. COLE,
WM. A. COOK,
Sols. for Appellees.

Notice.

To HENRY WISE GARNETT,
Solicitor for the Appellant.

You are hereby notified that on the 30th day of April, 1888, we will move the Supreme Court of the United States to dismiss the appeal in the above-named cause. A copy of said motion and brief in support thereof are hereto attached.

C. C. COLE,
WM. A. COOK,
Sols. for Appellees.

Statement of the Case.

The complainants brought this suit as children and heirs-at-law of Allison Nailor, senior, for partition of the real estate of which he died, siezed, or to which he was justly entitled. The bill alleges that Allison Nailor, junior, a brother of complainants, has in his possession certain of the real estate owned and possessed by their father in his life-time of the assessed value of about $65,000, which he unlawfully and unjustly claims to hold under certain deeds, which complainants allege to be void.

Several of said deeds were executed by the said A. Nailor, senior, to A. Nailor, junior, and as to these the bill charges that A. Nailor, sr., at the time he executed such deeds, was incompetent to make a deed or contract, and that they were obtained by the undue influence of A. Nailor, jr., over his father and at a time when he occupied a confidential and fiduciary relation towards him.

Others of such deeds, it is charged, were executed to the said A. Nailor, junior, by third persons, but that the purchase-price of the real estate thereby conveyed was paid by the said A. Nailor, senior, and that the latter was the equitable owner of such real estate.

And others of such deeds were executed to the said A. Nailor, junior, by the marshal of the District of Columbia for real estate sold by the marshal to satisfy judgments rendered against A. Nailor, senior.

Complainants charge that at the time of the rendition of said judgments and of the purchase of the real estate at the marshal's sales by the said A. Nailor, junior, he was the agent of his father, in charge of all his business, and as such purchaser took title to said real estate as trustee for his father, and now holds in trust for his heirs.

The complainants also claim that the said Allison Nailor, jr., has for several years past been in possession of the real estate which he so claims title to taking the rents thereof.

The prayer of the bill is that the said Allison Nailor, jr.,

will consent to bring the real estate so in his possession into the said estate for partition, and that partition of all of the real estate to which the parties to the suit are entitled as heirs of the said A. Nailor, senior, be decreed.

But if the said A. Nailor, jr., will not so consent, that the court will decree the several deeds under which he claims to be null and void, or that he holds the title to said real estate covered by them in trust for the heirs of said A. Nailor, senior, and that partition be made thereof accordingly.

Complainants also pray an account of the rents and profits of said real estate so claimed by A. Nailor, jr., and settlement thereof in this suit.

The answer of Allison Nailor, jr., denies that he has in his possession any real estate or other property belonging to, or which should belong to, the estate of Allison Nailor, senior. He admits the making of the several deeds to him, as alleged in the bill, and says they were and are valid deeds vesting in him good and perfect title to said real estate, and denies that said deeds or any of them are void for the reasons alleged in the bill or otherwise. He admits having held possession of said property, as alleged, but denies his liability to account for the rents and profits thereof.*

The cause coming on to be heard by the Court in General Term in the first instance upon the pleadings and proofs, the following decree was passed, from which the said Allison Nailor, jr., appealed to this court :

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*A printed copy of the bill and answers has been filed in the Clerk's office of this court to be used, if necessary, in the consideration of this motion.

Decree.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

WASHINGTON T. NAILOR, RACHEL E. TRIMBLE, and FRANCES M. CLARK, the last two mentioned being married women, who sue by their next friend, WASHINGTON T. NAILOR,

vs.

ALLISON NAILOR, jr., MAGGIE L. NAILOR, his wife, RACHEL D. NAILOR, JAMES W. CLARKE, MATTHEW TRIMBLE, and BETTIE F. NAILOR. In equity. No. 8116.

This cause having been certified to the Court in General Term by consent of counsel to be heard in the first instance, came on to be heard at this term, and was argued by counsel for complainants and defendants, and thereupon, upon consideration thereof, it is, this 7th day of July, in the year of our Lord 1886, ordered, adjudged, and decreed as follows: It appearing to the court that the several pieces or parcels of ground and premises described and referred to in the following conveyances in the proceedings mentioned, that is to say, in the deed dated October sixth (6th), in the year eighteen hundred and forty-two (1842), from John H. Goddard to Allison Nailor, being the west part of lot two (2), in square two hundred and fifty-four (254), in the city of Washington.

Also the deed dated May sixteenth (16th), eighteen hundred and sixty-one (1861), and recorded in liber J. A. S., No. 212, folio 130, from Columbus Alexander to Allison Nailor, jr., being the east thirty feet five and one-fourth inches front of lot two, by the depth thereof, in square two hundred and fifty-four, in the city of Washington.

Also in the deed dated October twenty-ninth (29th), in the year eighteen hundred and seventy-two (1872), from Allison Nailor, senior, to Allison Nailor, junior, being

lot four, in square one hundred and forty-one (141), in the city of Washington. Also in the deed dated October second (2d), in the year eighteen hundred and seventy-three (1873), from Allison Nailor, senior, to Allison Nailor, junior, being part of lot two (2), part of lot three (3), part of lot four (4), all of lot eight (8), all of lot nine (9), part of lot ten (10), part of lot eleven (11), all of lot twelve (12), all of lot thirteen (13), and part of lot fourteen (14), in square two hundred and fifty-five (255), in the city of Washington, were duly conveyed by way of advancement to the defendant, Allison Nailor, junior, by Allison Nailor, senior, deceased, or by his direction, and with his consent, and that at the time of the said conveyances the said Allison Nailor, senior, deceased, was capable of making and of directing and consenting to the same, and that in so making and directing or consenting he acted of his free will and without undue influence. And it further appearing that the piece or parcel of ground and premises described and referred to in the following conveyance in the proceedings mentioned, that is to say, in the deed dated August fifteenth (15th), in the year eighteen hundred and sixty-six (1866), from Allison Nailor, senior, to Allison Nailor, junior, being subdivision lot "B," in square two hundred and twenty-seven (227), in the city of Washington, was duly sold and conveyed to Allison Nailor, junior, the defendant, by Allison Nailor, senior, deceased, and that at the time of said sale and conveyance the said Allison Nailor, senior, deceased, was capable to make the said sale and conveyance, and that in making the same he acted of his free will and without undue influence. It is therefore ordered, adjudged, and decreed that the said defendant, Allison Nailor, junior, his heirs and assigns, is and are entitled, legally and equitably, to hold all and every part of the hereinbefore described pieces and parcels of land and real estate, together with all the rights, easements, and appurtenances to the same belonging, in fee-simple, free and discharged from any claim or demand of the complainants, or either of them, and that as to all and

singular the said real estate the bill be, and the same hereby is, dismissed with costs, without prejudice to the right of the administratrix of Allison Nailor, senior, to recover the unpaid balance of the purchase-money, if any such there be, for the piece or parcel of ground last above mentioned. And it further appearing to the court that by reason of the fiduciary relation in which the said defendant, Allison Nailor, junior, stood to Allison Nailor, senior, deceased, and other circumstances, he, the said Allison Nailor, junior, was incapacitated in equity from acquiring and holding in his own right, in the manner shown by the evidence, the pieces of property mentioned in the proceedings, as purchased by him at marshal's sale, being the property in the city of Washington, described in the following conveyances, that is to say, in the deed dated May 10th, in the year of our Lord eighteen hundred and seventy-three (1873), from Alexander Sharpe (marshal) to Allison Nailor, junior, being subdivision lot "C," in square two hundred and twenty-seven (227); also in the deed dated February fourth (4th), in the year of our Lord eighteen hundred and seventy-four (1874), from Alexander Sharpe (marshal) to Allison Nailor, junior, being the east half of lot nine (9), in square two hundred and twenty-eight (228); also in the deed dated June 25th (twenty-fifth), in the year of our Lord eighteen hundred and seventy-seven (1877), from Frederick Douglass (marshal) to Allison Nailor, junior, being part of lot numbered three (3), in square two hundred and fifty-four (254), lot eight (8), in square numbered four hundred and seventeen (417), and lot numbered nine (9), in square numbered two hundred and fifty-eight (258). Also in the deed dated October thirty-first (31st), in the year of our Lord eighteen hundred and seventy-seven (1877), from Frederick Douglass (marshal) to Allison Nuilor, junior, being lot ten (10), in square numbered two hundred and fifty-eight (258). Therefore, as to said pieces of property so purchased by him at marshals' sale, and conveyed to him by the marshals, it is ordered, adjudged, and decreed that the said defendant, Allison Nailor, junior, holds the same in trust for

the benefit of the complainants, but he is entitled to credit and to be allowed for all his outlays and disbursements on account of said property so purchased by him at marshal's sale, including the purchase-moneys actually paid by him, the cost of improvements and repairs, insurance, taxes, and public dues paid by him, and the sums paid by him to redeem the property from tax sales; and he is chargeable with all the rents actually received by him or for his use from and on account of said marshasl' sales property from and after the date of the respective sales to him; and it is hereby ordered that this cause be, and the same hereby is, referred to the auditor to state the account between the estate of said Allison Nailor, senior, deceased, and said Allison Nailor, junior, so far as said marshals' sales property is concerned, and to report the same to the court in special term. And it appearing from the record that on the 20th day of October, 1880, the defendant, Rachel D. Nailor, assigned all her dower right in said property to said Allison Nailor, junior, the said auditor is directed, in stating said account, to credit said Allison Nailor, junior, with one-third of said rents received since the 6th day of January, 1879, the date of the death of the said Allison Nailor, senior. The auditor is further directed, in stating said account, to charge said Allison Nailor, junior, with the sum of $6,000 received from one F. P. Burke for the purchase and sale of lot 5, in square 256, and with any other sums of money for which, at the time of the said marshals' sales he was accountable to Allison Nailor, senior, and to credit him with, and allow him therein, for all payments and disbursements of said $6,000, or other sums aforesaid, made to his father, or under his instructions, or on his account, or for his use and benefit. The auditor is directed to charge Allison Nailor, junior, with all costs of suit relating to such of the bill as grants relief to the complainants. If the said Allison Nailor, junior, has placed any encumbrances on said marshals' sales property the auditor is to charge him in said account with the amount of such encumbrances. It is further ordered, adjudged, and decreed that if upon the statement of said ac-

count there shall appear to be a balance in favor of the said Allison Nailor, junior, then the complainants may, upon the payment of said balance so found due, redeem from the said Allison Nailor, junior, all the right, title, and interest in the said described property purchased by him at marshals' sales, and upon such payment he, together with his said wife, shall convey to the complainants said property by a good and sufficient deed, reserving therein any rights of dower or interest which may have been assigned or conveyed to him by said Rachel D. Nailor. And if upon the statement of said account there shall appear to be no balance due him, then the said Allison Nailor, junior, together with his said wife, shall convey to the complainants by a good and sufficient deed all the right, title, and interest in the said described property purchased by him at marshals' sales, reserving therein any rights of dower or interest which may have been assigned or conveyed to him by said Rachel D. Nailor. It is further ordered, adjudged, and decreed that the complainants are entitled to have and to hold all the estate which belonged to their father at the time of his death except that hereinbefore referred to and described in this decree, and as to which the bill is dismissed, as aforesaid, wherever situated (subject to such rights of dower of his widow, the said Rachel D. Nailor, may have in the same), free and discharged from all claim and demand whatever of the said Allison Nailor, junior, and his wife, Maggie L. Nailor, or either of them, and that such portion of the estate is subject to partition among the complainants. And the cause is remanded to the special term for further proceedings in conformity with this decree.

WM. M. MERRICK, *A. J.*

Law Points.

It is apparent that the decree in this cause is not final. It decides the right to the property in contest, but it does not direct the property to be delivered up by the defendant. It does not divest him of the legal title or require him to convey it. He is entitled to remain in possession of the

real estate, as to which an accouning was ordered, and to take the rents and profits until some further decree in the cause.

As was said by Taney, C. J., in Parsons *vs.* Fourinquet, it is the common interlocutory decree passed by courts of chancery in cases of this kind, and is absolutely necessary to prepare the case for a final hearing and final decree wherever the complainant is entitled to a partition of property or an account.

Questions are likely to arise in stating the account directed by the decree which must be adjudicated by the court, and from which either party will be entitled to appeal to this court.

The court, in passing the decree appealed from, seems to have been governed by the recommendation of the Supreme Court in Forgay *vs.* Conrad, where it is said: "We, however, feel it our duty to say that we cannot approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit and to have the whole case and every matter in controversy in it decided in a single appeal."

The decisions of this court are uniform that such a decree as is appealed from in this case is not a final decree within the meaning of the acts of Congress.*

It is therefore respectfully submitted that the motion to dismiss the appeal should be granted.

C. C. COLE.
W. A. COOK.

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*Railway Co. *vs.* Simons, 123 U. S., 52.
Parsons *vs.* Robinson, 122 Id., 112.
Forgay *vs.* Conrad, 6 How., 201.
Perkins *vs.* Fourinquet, Id., 206.
Pulliam *vs.* Christian, Id., 209.
Craighead *vs.* Wilson, 18 How., 199.
The Palmyra, 10 Wheat., 502.
Green *vs.* Fish, 103 U. S., 518.

The case last cited seems to be conclusive upon this motion. It was a suit for partition of real estate, and the decree went as far as the one in the present case in determining the rights of the litigants.